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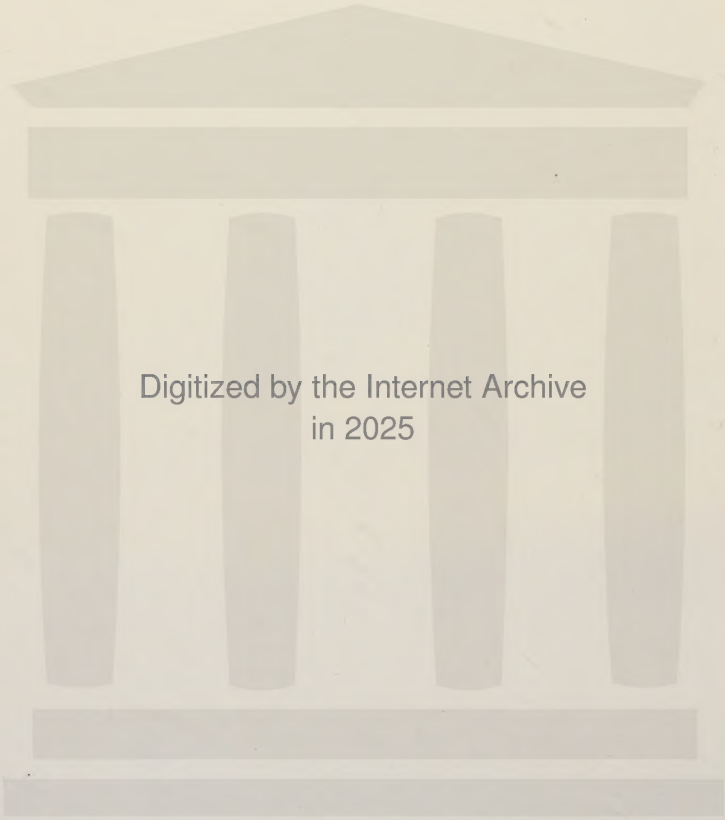
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PRECEDENTS

FROM THE

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Drafts of Actual Practice;

WITH

GENERAL COMMON FORMS AND VARIATIONS

ADAPTED TO ALL THE CIRCUMSTANCES USUALLY OCCURRING;

FORMING A

SYSTEM OF CONVEYANCING;

WITH

DISSERTATIONS, AND PRACTICAL NOTES.

The Second Edition,

BY

THOMAS JARMAN, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

IN CONTINUATION OF THE WORK OF THE LATE

W. M. BYTHEWOOD, Esq.

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TO THE

SECOND EDITION OF THE SEVENTH VOLUME.

THE additions to and alterations in the Second Edition of the Seventh Volume have been more considerable than those of any preceding Volume, especially in the Preliminary Dissertation and Notes to the title "Purchase Deeds," in which much new matter will be found.

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PRECEDENTS

IN

CONVEYANCING.

PARTNERSHIP.

I. WHAT CONSTITUTES A PARTNERSHIP, AND AS TO THE RIGHTS AND OBLIGATIONS OF PARTNERS.

II. HOW A PARTNERSHIP MAY BE DISSOLVED, AND SOME OF THE CONSEQUENCES OF ITS DISSOLUTION.

III. AS TO DEEDS OF PARTNERSHIP (*a*).

I. WHAT CONSTITUTES A PARTNERSHIP, AND AS TO THE RIGHTS AND OBLIGATIONS OF PARTNERS.

Definition of partnership.

Partnership, according to Puffendorf, lib. 5, cap. 8, "*Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inde redit lucri inter singulos pro ratâ dividatur—nec minus si quid proveniat damni, a singulis pro ratâ feratur.*" In the definition of a partnership, the pursuit of profit is invariably made an essential ingredient; but, undoubtedly, for some purposes a partnership may subsist without any such object: Thus, if several persons were to practise jointly as attornies or surgeons, for the purpose of affording gratuitous advice, it is clear that they would contract to third persons the responsibility of partners. Of course, there could not, in such a case, be a dormant partner incurring liability by participation of profit; but this seems to be the whole

(*a*) Although a small portion only of this article is devoted to the direct consideration of the form of partnership deeds, yet it will be obvious that most of the topics selected for discussion tend more or less immediately to shew the nature of the provisions proper to be introduced into such deeds. Indeed, without some knowledge of the principles governing the general rights and obligations of partners, a person cannot satisfactorily sit down to the task of drawing the instrument by which those rights and obligations are intended to be defined and regulated.

amount of the difference occasioned by the non-lucrative nature of the partnership.

Joint tenants of land not partners.

As to joint ownership in mines.

It is clear that the acquisition of a joint interest in land does not *per se* render the co-proprietors partners. In order to constitute a partnership between them, there must be a joint dealing with the property, *ultrà* the mere purpose of occupation or enjoyment. A difficult question of this nature sometimes arises in regard to mines: namely, whether, if persons holding undivided shares in such property concur in working the mines for the purpose of bringing the produce of their joint property to market, this constitutes them partners in trade. For some purposes, it is clear, a Court of Equity will treat the undertaking as a partnership, by appointing a receiver, &c., since it is by means of co-operative management only that the property can be beneficially enjoyed by a large number of proprietors; joint occupation being impossible; and the case therefore resembling more a partnership in trade than the mere occupation of land by joint tenants, or tenants in common. *Jeffreys* v. *Smith*, 1 Jac. & Walk. 298. Of course, where, in addition to working their own mines, the parties purchase the produce of other mines to be manufactured and sold with their own, they are for all purposes trading partners. See *Crawshay* v. *Maule*, 1 Swanst. 523.

Co-proprietors of goods not necessarily partners.

So, it has been frequently decided, that persons do not become partners by merely possessing goods or other personal chattels in certain aliquot shares. Thus, in *Coope* v. *Eyre*, 1 Hen. Blackst. 37, (which is a leading case), it was held that the purchase of goods by one of four persons on account of himself and the other three, under an agreement that they should be interested therein in certain aliquot shares, did not constitute them partners, there being no agreement that they should *jointly* resell the goods; and, consequently, that one becoming bankrupt, an action could not be maintained by the vendor to recover damages for the non-performance of the contract, against the others as partners. Lord *Loughborough* said—"In order to constitute a partnership, a communion of profit and loss (*a*) is essential. The shares must be joint, though it is not necessary they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners." So, in *Hoare* v. *Dawes*, Doug. 371, where a broker, on behalf of himself and several other persons, purchased a lot of teas, at the East India Company's sale, of which they, together with himself, were to have separate shares, the lots in general being too large for one dealer, it was held, that the defendants, who were two of the persons on whose behalf the purchase was made, were not liable, as partners, to bankers who advanced money to the broker on the security of the tea-warrants; this not

(*a*) This position, though often laid down, is not strictly correct. Participation of profit alone is sufficient to make a partnership, without any agreement to share the losses. *Ex parte Langdale*, 18 Ves. 301.

being a partnership transaction, but merely an undertaking by each with the broker to take a particular quantity, without any agreement to share the profit or loss. And even where the purchase is made with a view to a future joint trading with the property, this does not involve the parties in the liability of partners in relation to such purchase. Thus, in the late case of *Greenslade* v. *Dower*, 7 Barn. & Cress. 635, A. and B. entered into an agreement with W. to take a farm, in which they were to be jointly interested, and they were to pay for fixtures, household furniture, crops, stock, &c., at a valuation, the payment being to be made partly in cash and partly in bills; subsequently to this agreement, A., without the authority of B., entered into a new agreement with W., in which a different mode of payment was arranged, the bills to be given being of longer dates; in pursuance of which new agreement, A. gave W. bills in the joint names of himself and B., took possession of the farm, &c. It was held, that W. could not recover against B. on these bills, as the mere joint occupation of the farm did not operate by relation so as to render them binding upon B., they having been given contrary to the terms of the original contract, and without his assent. Mr. Justice *Bayley* remarked—"If several partners are in trade together, a bill accepted by one in the name of the partnership, and in the course of their trading, binds them all. But there is a great difference between such a bill, and one drawn for the purpose of founding the partnership. Originally, each partner would have to bring in his proportion of the capital, and it would be very unjust to let the acceptance of one for the capital bind all the others; no authority of that nature can be implied, nor does it arise by operation of law, the debt not being a partnership debt." And the fact of a person becoming, by *subsequent* contract, a sharer in an adventure with goods already purchased by his colleague, does not render him liable to the vendor. *Young* v. *Hunter*, 4 Taunt. 583. And Lord C. J. *Gibbs* in this case said, that he was "by no means of opinion that there may not be a case, where two houses shall be interested in goods from the beginning of the purchase, yet not both be liable to the vendor; as, if the parties agree among themselves that one house shall purchase the goods and let the other have an interest in them, that other being unknown to the vendor; in such a case the vendor could not recover against him, although such other person would have the benefit of the goods." And of this opinion was the Court of King's Bench (*dissentiente Ashurst*) in the case of *Saville* v. *Robertson*, 4 D. & E. 720, where a somewhat similar question arose. See also *Coope* v. *Eyre*, 1 Hen. Blackst. 37. But, in the more recent case of *Gouthwaite* v. *Duckworth*, 13 East, 426, it was decided, that a purchase made by two persons on behalf of themselves and another, with whom they had no general partnership, bound all the parties, though the vendor furnished the goods on the sole responsibility of the ostensible purchasers alone; Lord *Ellenborough* stating the rule to be, that, "if all agree

Purchase made prospectively to a partnership, does not render the parties liable as partners.

Subsequent contract does not make persons partners *ab initio*.

to share in goods to be purchased, and, in consequence of that agreement, one of them go into the market and make the purchase, it is the same for this purpose as if all the names had been announced to the seller; and therefore all are liable for the value of them." See also *Delauney* v. *Strickland*, 2 Stark. 416. This, it is submitted, is the most sensible doctrine, for the case seems not to be distinguishable from the ordinary instance of a dormant partner, who, though not known to, and therefore necessarily not trusted by, the creditor, is liable on account of his interest in the profits; and the circumstance that the parties were connected in this particular transaction only, and were not general partners, does not vary the principle.

Application of proceeds of bill to partnership purposes.

But if a partner draws a bill in his own name, which is discounted by a third person, and the proceeds are applied by the drawer to the use of the partnership, this application of the proceeds does not render the firm liable to the holder of the bill. *Emly* v. *Lye*, 15 East, 7. So, of a person borrowing money on his own private account, which he subsequently devotes to partnership purposes. *Lloyd* v. *Freshfield*, 9 Dowl. & Ryl. 19.

Partnership among coach proprietors.

A peculiar species of partnership frequently exists among stage coach proprietors, with respect to coaches that run long distances. One partner stipulates to supply the coach with horses for a certain part of the road, and another for other part; and the profits of the whole are divided accordingly. And this renders them partners *sub modo*, *i. e.* they are jointly liable to passengers who travel by the coach, and are under the common disability attaching to partners to sue each other for any proportion of monies received on account of the concern. *Fromont* v. *Coupland*, 2 Bing. 170; *S. C.* 9 Moore, 313. But, a person furnishing goods to one proprietor for the supply of the horses which are his exclusive property, has no claim upon the other. *Barton* v. *Hanson*, 2 Taunt. 49.

If a partner enter into a sub-contract with a third person, to allow him a portion of the profits, in consideration of his performing his (the partner's) *quota* of the partnership engagement, this gives him no claim as partner against the others. And, therefore, where A., B., and C., coach proprietors, worked a coach from London to Bath, each finding horses for certain stages, and C. employed D. (the plaintiff) to provide horses for part of his distance; it was held, that D. could not maintain a suit, as partner, against the three for an account, and for a share of the profits; since his claim, being derived through C., was subject to the account between C. and his partners, and could extend only to any balance that was due to C. It would have been otherwise if the co-defendants had accepted D. in the concern instead of C. *Bray* v. *Fromont*, 6 Madd. 5. See, also, *Gibbons* v. *Wilcox*, 2 Stark. 43.

The question, partner or no partner, more frequently arises in relation to the claims of third persons, than in transactions between the parties themselves, being commonly raised, as we have already seen, by an attempt on the part of creditors to fix an individual with the responsibility

of partner, on the ground of his being an actual, though secret, participant in the profits of the concern.

Classification of partners.

In regard to the parties themselves, the question simply is, whether there is an agreement to share profits, this being the sole criterion and characteristic of partnership *inter se*. In regard to third persons, the question presents itself in a more complex form. Partners in this respect are divisible into two classes: *first*, open or ostensible partners; *secondly*, secret or dormant partners (*a*).

As to ostensible partners.

Partners of the first class are persons who allow their names to be used in a firm, and thereby become liable to its engagements, whether they have any actual interest in the profits or not. Cases of this kind afford little scope for inquiry, as they turn entirely upon the point, whether the party attempted to be charged has held himself out to the world as partner; and the affirmative being established, the responsibility incident to the relation necessarily ensues. Of course, a party representing himself to a third person as partner, is to all purposes liable to be charged as such in transactions with that person, whether the representation be true or false. *See De Bertrom* v. *Smith*, 1 Espin. 29.

Liability of ostensible partners without interest.

In order to charge an *ostensible* partner who has no actual interest, it is not necessary for the creditor to shew that he contracted with the firm on the faith of such party's liability. Indeed, Lord *Mansfield* seems to have thought that even if the creditor were proved to have been ignorant of the fact of the party being an apparent partner, (a fact not often capable of proof), this would not discharge the latter. In the case before his Lordship, however, it appeared very doubtful whether the ostensible partner had not an interest sufficient to render her liable; and, therefore, it can hardly be considered as an authority upon the point. The case alluded to is *Young* v. *Axtell*, cit. 2 Hen. Blackst. 242, where it appeared that an agreement had been entered into between the defendants, A. and B., stating, that A. had lately carried on the coal trade; and that B. did the same; that A. was to bring what customers she could into the business, and that B. was to pay her an annuity, and also 2*s*. for every chaldron that should be sold to those persons who had been her customers, or were of her recommending. Bills were made out for goods sold to her cus-

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(*a*) The division of partners, *with respect to third persons*, into three classes, namely, actual ostensible partners, secret or dormant partners, and nominal partners, (which is adopted by Mr. Gow, in his valuable treatise), is, it is conceived, not completely accurate; for, with respect to third persons, ostensibility of interest invests a person with the "actual" character of partner, without regard to the fact of interest; consequently, there is no difference *as to them* between what is here termed an actual ostensible partner, and a nominal partner; they are both "actually" such to the world, these terms of distinction being only applicable as between the parties themselves.

tomers, in their joint names; and the question was, whether A. was liable to a debt, for coals, contracted with the plaintiff. Lord *Mansfield* said, he should have rather thought, on the agreement only, that A. would be liable, not on account of the annuity, but of the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, *though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used.*

As to dormant partners.

A secret or dormant partner is a person, who, though not known to the world as partner, incurs the liability incident to the character, by his participation in the profits. The principle upon which this liability is founded is, that, by sharing the profits, he takes part of the fund to which the creditor has a right to resort for payment; in short, that, as he is to enjoy the profits of the concern if it prospers, he ought to bear its burdens if it does not, according to the well-known maxim, *qui sentit commodum, sentire debet et onus.* It is true, the creditor has not trusted the firm on his responsibility; but, inasmuch as the person whom he *has* trusted (*i. e.* the ostensible trader) is the less able to satisfy the creditor's demand, on account of his connection with the person in question, it is fair that that connection should entail on the latter the responsibility of partner. The consequence of a contrary doctrine would be, that a man might enjoy nine-tenths of the profits of the business for twenty years, and, in the twenty-first year, when the ostensible trader, impoverished by this exhausting absorption of his income, was no longer able to meet his engagements, the secret partner would come forth from his obscurity, merely to exhibit to the deluded creditors the channel through which the profits of the business, whose known prosperity had induced their confidence, had irrecoverably passed away.

What dealing constitutes a partnership.

We proceed now to the inquiry, what species of dealing amounts to a participation of profit constituting a partnership; in the examination of which, the reader, for reasons that will presently appear, should carefully bear in mind the distinction already adverted to, between cases in which the question arises between the parties themselves, and where it arises in transactions with third persons.

A few cases will be sufficient to illustrate instances of partnership by participation of profits. In a late case it appeared, that A. & Co., who were merchants in London, recommended B. to consign goods to C. & Co., at Rio Janeiro, for sale, (there being an agreement between the two houses to divide the commission on sales recommended by one to the other), and C. & Co. were to remit the proceeds to A. and Co.: A. & Co., on receiving advice from C. and Co., that the goods were sold, advanced money to B., on account. An action by the assignees (in bankruptcy) of A. and Co., to recover this money from B., failed, on the ground that the arrangement between A. & Co. and B. and Co. to divide the commission, constituted them partners *quoad hoc.* *Cheap* v. *Craymond*, 4 Barn

& Ald. 663. So, where A. and B. entered into an agreement to apply to the owner of a ship, for permission to advertise her for Van Dieman's Land, they undertaking to procure a full cargo for a certain commission, of which A. was to receive one moiety and B. the other. It was held, that one could not maintain an action against the other for his moiety of the commission, on the ground that the transaction constituted them partners. *Bovill* v. *Hammond*, 6 Barn. & Cress. 149. An agreement by a brewer with a publican, to supply him with beer at a certain rate above the market price, and pay half his rent, does not, it seems, render them partners: *contrà*, if he is to receive a certain sum on every given quantity of beer sold. See *Ex parte Langdale*, 18 Ves. 300.

Difference between a participation of profits and the allowance of a sum proportioned to the profits.

But "if a man stipulates, as the reward of his labour, that he shall have not a specific interest in the business, but a given sum of money, *even in proportion to a given quantum of the profits, that will not make him a partner;* but, if he agrees for part of the profits, as such, giving him a right to an account (*a*), though having no property in the capital, he is, as to third persons, a partner." *Per* Lord *Eldon* in *Ex parte Hamper*, 17 Ves. 404. See also *Ex parte Watson*, 19 Ves. 461; *Ex parte Rowlandson*, 1 Rose, 89. This distinction seems to be very refined, and has been more than once condemned by the very learned judge in whose words it has been just stated. The doctrine, however, stands upon the uncontradicted authority of several cases. Thus, in *Benjamin* v. *Porteus*, 2 H. Bl. 590, where a broker was employed to sell indigo, under an agreement that he was to have for his own profit whatever he could obtain upon the sales above a given sum, instead of a per-centage in the usual way: it was contended, as an objection to the admissibility of his evidence to prove the contract, in an action by his principal, that he was partner, and not broker; but the Court held otherwise, this being, it was said, only a mode of paying him for his trouble as broker. So, in the case of *Wilkinson* v. *Frasier*, 4 Esp. 182, it was held, that, under the usual agreement entered into with seamen in the whale fisheries, to give them a certain share in the produce of the cargo, instead of wages, they might support an action for the recovery of the amount as wages, it being no partnership. Again, in the case of *Dry* v. *Boswell*, 1 Camp. 329, where the proprietor of a lighter agreed with A., a person who worked the lighter, that, in consideration of working her, the latter should receive one half of the *gross earnings* (not the profits merely) for his labour; it was held, by Lord *Ellenborough*, that such an agreement did not constitute a partnership, it being merely a mode of paying A. wages for his labour, and was different from a participation of profit and loss; and, therefore, that A. was not liable for repairs done to the lighter, for which the present action was brought. So,

(*a*) But, would not a person who was to receive an annual sum, *proportioned* to the amount of profits, be entitled to an account of profits? If not, how is he to ascertain that he has what he stipulated for?

in *West* v. *Small*, 1 Camp. 331, n., where A., having purchased some bullocks, put them to depasture upon the land of B., it being agreed that the profit to be made upon the re-sale above 20*l.*, at which A. then valued them, should be equally divided between him and B.: in an action brought by A. alone, it was contended, that A. and B. were partners, and ought to have joined in the action; but it was held by Mr. Baron *Thomson* not to be necessary, as this was a mode of paying B. for the pasture, and no partnership. Again, in *Gibbons* v. *Wilcocks*, 2 Stark. 43, where there was an agreement between a broker and A., that the latter should have one half of the commission claimable by the former, for brokerage one effecting policies of insurance, and it was objected to an action brought by the broker alone, that A. ought to have been made a co-plaintiff—Mr. Justice *Holroyd* overruled the objection, saying, that it was a mere sub-contract. So, in the case of *Meyer* v. *Sharpe*, 5 Taunt. 74, *S.C.* 1 Rose, 124, the Court of Common Pleas held, that an agreement between A, a merchant in London, and B. & Co. of St. Petersburgh, that A. should consign goods to B. & Co., who were to return the proceeds in Russia produce, and to receive a third of the profits of the outward adventure, and a half of the profits of the homeward bound adventure, did not constitute B. & Co. partners in the goods, so as to vest in them the legal property in that character, there being, it was said—"a plain and clear distinction between being partners in the goods, and being interested in the adventure." To the preceding cases, perhaps, may be added, *Muirhead* v. *Salter*, (shortly cited 4 Barn. & Ald. 667), where the Court of Common Pleas is said to have held, that a division of the commissions on effecting particular policies between insurance brokers, did not constitute a partnership. In the brief note of this case, it does not appear between what parties the question arose. And in a later case the learned judge then at the head of the same Court (*Best*), was of opinion that an agreement to allow a person sent out on a foreign mining adventure one-fifth share of the profits belonged to this class of cases, and did not constitute a partnership; but it was unnecessary to decide the point, and the opinion seems to go farther than is warranted by any of the adjudications referred to. *Withington* v. *Herring*, 3 Moo. & Pay. 30.

Remarks upon the cases.

In all the preceding cases (except perhaps the last) it will be perceived, the question, as to the existence of a partnership, arose in transactions with third persons, and the negative was established even as to them; it follows, therefore, *a fortiori*, that no partnership existed as between the parties themselves; for, though persons may be partners in regard to the world, who are not partners *inter se* the converse of the proposition does not hold, namely, that persons may be partners *inter se* who are not partners in regard to the world. A leading authority for the distinction here noticed is *Waugh* v. *Carver*, 2 H. Bl. 235, where A. and B., who were ship agents at different ports, entered into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on

tradesmen's bills employed by them in repairing the ships consigned to them, and sums received for warehouse rent, after deducting one fifth for expenses, but that each party should separately and exclusively bear his own losses. The question was, whether this agreement involved the parties in the *responsibility of partners to third persons; and it was held, that it did. "It [*9] is plain," said Ch. J. *Eyre*, "upon the construction of the agreement, if it be construed only between A. and B., that they were not, nor ever meant to be, partners; they meant each house to carry on trade without risk of each other, and to be at their own loss; though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either: that was the agreement between themselves. But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case, therefore, is reduced to the single point, whether A.'s house did not entitle themselves, and did not mean to take a moiety of the profits of B.'s house, generally and indefinitely, as they should arise, at certain times agreed upon for the settlement of their accounts: that they have so done, is clear upon the face of the agreement; and, upon the authority of *Grace* v. *Smith*, (2 Black. 998), he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise; upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." So, in the case of *Hesketh* v. *Blanchard*, 4 East, 144, where A. offered to B., the captain of a vessel, that, if he would order with him certain goods of C., for B. to take with him on a voyage, *if any profit should arise from them*, B. *should have half for his trouble.* B. acceded, and the goods were ordered by them jointly of C.; B., at the request of A., effected an insurance; B. afterwards paid the whole sum, and now brought an action against the executors of A. to recover the sum so paid; which was resisted, on the ground that the agreement constituted a partnership, and, therefore, A. could not recover, the action not being maintainable by one partner against another: but the Court held, that the plaintiff was entitled to a verdict. Lord *Ellenborough* said—"The distinction taken in *Waugh* v. *Carver* applies to this case. *Quoad* third persons, it was a partnership; for the plaintiff was to share half the profits: but, as between themselves, it was only an agreement for so much, as a compensation for the plaintiff's trouble, and for lending B. his credit." Again, in the late case of *Smith* v. *Watson*, 2 Barn. & Cress. 401, there was an agreement between A., a merchant, and B., a broker, that B. should purchase goods for A., and that, as a remuneration for his trouble, he should receive one fourth of the profits arising from the sale, and he was also to bear one eighth of the losses; and it was held, that this was merely a mode of pay-

Distinction between partnership *inter se*, and partnership as to third persons.

ing B. for his trouble as broker, and did not vest the joint property in A. and B. as partners. Mr. Justice *Bayley* said, that—"A right to share in the profits of a particular adventure may have the effect of rendering a person liable to third persons as a partner in respect of transactions arising out
[*10] *of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject matter of the adventure." So, in the case of *Geddes* v. *Wallace*, 2 Bligh, 270, Lord *Eldon* expressly admitted the distinction in question; his Lordship being of opinion, upon the construction of the articles, and the result of the dealings of the parties, that a person employed as manager, with a salary, though rendered liable to third persons by his acts as partner, did not sustain that character as between the parties themselves.

Whether an annuity out of profits makes the annuitant a partner.

Another question, which has been much agitated, is, whether the acceptance of an annuity out of the profits of a trade entails upon the annuitant the responsibility of partner. Such an annuity is frequently payable, under the provisions of articles of partnership, by surviving partners, to the widow, children, or representatives of the deceased partner, or by continuing partners to a seceding partner, as a consideration for his share of the goodwill. In *Bloxham* v. *Pell*, cit. 2 Black. 999, (of which case only a very short note is extant), B. and P., being partners, entered into an agreement, wherein it was recited, that B., being desirous to have the profits of the trade to himself, and P. being desirous to relinquish his right to the trade and profits, it was agreed, that B. should give P. a bond for 2485*l.*, which P. had brought into the trade, with interest at 5*l. per cent.*; which was accordingly done: and it was further agreed, that B. should pay to P. 200*l. per annum* for six years, if P. so long lived, *as and in lieu of the profits of the trade;* and B. covenanted that P. should have free liberty to inspect his books. B. became a bankrupt before any thing was paid to P.; and this action being brought for a debt incurred by B. in the course of trade, Lord *Mansfield* held, that P. was a secret partner. "This was," he said, "a device to make more than legal interest of money; and, if it was not a partnership, it was a crime; and it should not lie in the defendant P.'s mouth to say 'it is usury and not a partnership.'" Mr. Gow (Treat. Part. p. 23) states Lord *Mansfield* to have decided this case upon the ground "of the annuity being casual, as depending on the life of the grantor; and the liberty to inspect the books, which was reserved to the seceding partner, being, in fact, the right of a partner, and shewing that he was not wholly uninterested in the profits."

Though I am not aware of any distinct authority for imputing these observations to Lord *Mansfield*, as they do not occur in Blackstone's Reports, where alone the case is noticed, yet it is highly probable that such were the grounds of his Lordship's decision. That an annuity, payable out of, and liable to fluctuate with, profits, involves the person receiving it in the responsibility of partner, was lately decided in the case of *Ex*

parte Wilson, in the matter of *Colbeck*, Buck, 48, where A., being in partnership with several other persons, by deed assigned to two of his partners all his share of the partnership trade and property, upon trust, to pay an annuity of 50*l.* a-year to himself for life, and after his death to his *wife for life, and, upon the death of the survivor, in trust for their infant children; and it was also stipulated, that, if the proceeds of A.'s share should not be sufficient to pay the annuity of 50*l.* a-year, then, that it should abate proportionably; or, on the other hand, if his share, so assigned, should amount in value to 5000*l.*, that then the annuity should be increased to 100*l.* After the execution of this deed, A. retired from the concern; but the style of the firm was not altered. The question was, whether A. continued a partner after the execution of this deed. Lord *Eldon* held, that he did; on the ground that the annuity he reserved was not merely an annuity the amount of which was calculated with reference to the then present profits, but it was to be paid out of the profits, and to be subject to abatement or enlargement, as the profits might fluctuate. See also *Ex parte Chuck*, 1 Moore & Scott, 615, where the person who was decided to be a partner, had not only an annuity depending on the amount of profits, but also a share in the joint stock.

[*11]

It is clear, however, that an annuity granted by a continuing to a seceding partner, absolutely, and without reference to the profits, does not raise a constructive partnership: thus, in the case of *Grace* v. *Smith*, 2 Blackst. 997, where S. and R. entered into partnership for seven years, but, shortly afterwards, some disputes arising, they agreed to dissolve their partnership; the terms of the dissolution were, that all the stock in trade, and debts due to the partnership, should be carried to the account of R. only; that S. was to have back 4,200*l.*, which he brought into the trade, and 1000*l.* for the profits then accrued since the commencement of the partnership; that S. was to lend R. 4,000*l.*, part of this 5,200*l.*, or let it remain in his hands for seven years, at 5*l. per cent.* interest, and an annuity of of 300*l. per annum* for the same seven years; for all which R. gave his bond to S. It was held, that this was a loan, and not a partnership, *Blackstone*, J., observing, that "the true criterion, when money is advanced to a trader, is, whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade: in the former case, it is a loan, in the latter a partnership."

As an absolute annuity to a retiring partner (*a*) does not constitute him a partner, it follows that an absolute annuity to the widow or representatives of a deceased partner has no such effect; of which opinion, evidently, was *Eyre*, C. J., in the case of *Waugh* v. *Carver*, 2 H. Black. 235, where the

(*a*) To designate him a "retiring partner," it is obvious, begs the question; but such inaccuracies are often not avoidable without much circuity of expression.

learned Chief Justice considered that it would have been an objection to the conclusion he was inclined to come to in that case, had it involved the consequence, "that, if there was an annuity granted out of a banking-house to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy." But
[*12] he thought that the case would not lead to that consequence. In *order, however, to avoid the contrary construction, even in such cases, the annuity should be absolute, and not liable to fluctuate with the amount of the profits; *a fortiori*, it should not be reserved as a portion of profits: and (in order to exclude the application of Lord *Mansfield's* reasoning in *Bloxham* v. *Pell*) a right to investigate the accounts of the concern should not be given to the annuitant, for which, indeed, there would be no occassion, if the annuity were not dependent upon the profits.

As an absolute annuity to a seceding partner does not make him a partner, of course such an annuity to a stranger, who has previously carried on a similar trade, in consideration of his recommending his customers, creates no partnership. *Young* v. *Axtell*, cit. 2 Hen. Blackst. 242.

Unrestricted responsibility to third persons incident to partnership.

One of the most important consequences of the partnership relation is the unlimited responsibility which it induces for the engagements of the firm: for, it may be stated as an universal rule, that, whatever agreement exists among the partners themselves, restrictive of the responsibility of each, and however limited may be the object or numerous the members of the partnership, each individual member of the firm is liable, to the whole extent of his property, to the joint debts. Partnership with restricted responsibility is unknown to the law of England, in which respect our law differs from that of France and some other continental European states where such partnerships are allowed, the deeds constituting them being generally required to be registered. See 1 H. Bl. 37. So, by the Irish statute, 21 & 22 Geo. 3, c. 46, intituled "An Act to promote trade and manufacture by regulating and encouraging partnerships," but generally called the Anonymous Partnership Act, persons entering into a joint trade or partnership, "for the purpose of buying or selling in the gross or by wholesale," for any term not exceeding fourteen years, and not acting or appearing therein, are allowed to "bind themselves to pay in money, towards a joint stock, such sums as they shall respectively think fit," the capital not being less than 1000*l.*, or more than 50,000*l.*; and their liability is confined to the amount of their subscription, provided the sums subscribed be paid in the manner required by the act, and the deed be registered at Dublin before the commencement or within ten days after the commencement of the partnership.

Unless negatived by notice or agreement.

But the principle just noticed, of course, does not deny operation to any positive agreement made by a partner with creditors themselves; for, as the liability of a partner proceeds upon the ground of a tacit and implied contract, it may be negatived by express stipulation. If, therefore,

a partner give notice to a person who has been in the habit of supplying the firm with goods, that he will be no longer answerable for such goods, he cannot be charged for goods subsequently furnished. *Vice* v. *Fleming*, 1 Younge & Jerv. 226. So, a person taking a bill of exchange from one partner, after notice from another that he will not be answerable, has no *claim upon the latter. Lord Visc. *Galway* v. *Mathew*, 10 East, 266 (*a*). [*13] See also 10 Barn. & Cress. 295. And here, it may be observed, that the rule which subjects merely nominal partners (*i. e.* ostensible partners without interest) to the engagements of the firm, admits this important qualification, that a person knowing that the individual, thus appearing as partner, actually possessed no interest in the concern, and that, by the contract between the parties, he was not to be liable as such, cannot charge him in that character. *Alderson* v. *Pope*, 1 Camp. 404, n. Upon the same principle, if a person receives from a partner a pledge of goods, knowing this to be a misapplication, he acquires no property in the goods so pledged. *Snaith* v. *Burridge*, 4 Taunt. 684. So, if a person take from a partner a bill of exchange, with the knowledge that he had no authority, according to the existing articles between him and his partners, to give such bill, he cannot recover against the other partners. See Lord *Galway* v. *Mathew*, 10 East, 266. And this knowledge would be implied, where the bill was given in a transaction not connected with the partnership, as, to secure the private debt of the party giving it; *Ex parte Goulding*, 2 Glyn & Jam. 118; see also *Shirreff* v. *Wilks*, 1 East, 48; *Ex parte Bonbonus*, 8 Ves. 540; see also *Wells* v. *Masterman*, 2 Esp. 731; *Swan* v. *Steel*, 7 East, 210; *Green* v. *Deakin*, 2 Stark. 347; (though this is not always conclusive, *Ridley* v. *Taylor*, 13 Ves 175); or where the person taking the bill was expressly informed that the transaction was to be concealed from the other partners. *Arden* v. *Sharp*, 2 Esp. 523. And upon the same principle, a newly admitted partner would not be bound by a bill given by the new firm to secure an antecedent debt owing from the old firm. *Shirreff* v. *Wilks*, 1 East, 48.

Nominal partner not responsible to a person knowing he had no interest.

Adjudicated points as to partnership liability.

But, in these cases, if the bill gets into the hands of third persons, who are not affected with notice of the circumstances under which it was given, all the partners *ostensibly* constituting the firm at the time the bill was given will be bound. See *Wells* v. *Masterman*, 2 Espin. 231; *Lane* v. *Williams*, 2 Vern. 277, 293; *Usher* v. *Dauncey*, 4 Camp. 97. The word "ostensibly," is introduced into this position, because it has been held that a *dormant* partner is not liable on a bill given after his admission to the partnership, to secure a debt due from the firm antecedently, even in

(*a*) This, however, was considered as an unsettled point, by the Court of Exchequer, in *Routh* v. *Quin*, 7 Price, 202; and Lord Chief Baron *Richards* adverted to some special circumstances in the case of Lord *Galway* v. *Mathew*, not noticed in the report.

the hands of a third person; he having neither an actual nor an apparent interest; one of which circumstances is requisite to fix a partner with responsibility; and though the party taking the bill relied upon the credit of the house, yet, as he did not know that the individual in question belonged to the firm, he did not take it upon *his* credit. *Lloyd* v. *Ashby*, 2 Carr. & Pay. 138. Nor would a partner be liable to an action by a third person, for a debt contracted by the firm on the 21st of May, by the effect of a *subsequent* agreement between him and the firm, that he should be considered as a partner from the 18th of the same month, this being a mere bargain between him and his partners, of which the creditor is not to take advantage. *Vere* v. *Ashby*, 10 Barn. & Cress. 288. The general rule, however, is, that, where a partnership firm is pledged by the acceptance of a bill of exchange by one partner in the name of the firm, all the partners, whether known or secret, are bound, unless the title of the person who seeks to charge them can be impeached. *Wintle* v. *Crowther*, 1 Cromp. & Jerv. 316; *Lloyd* v. *Ashby*, 2 Barn. & Adolph. 23. And where the person taking the bill knew at the time that part of its amount was applied to the separate use of the accepting partner, a secret partner, not known to the party in question, (though discharged *pro tanto*), was held to be liable to pay the remaining portion which was not so applied. *Wintle* v. *Crowther*, 1 Cromp. & Jerv. 316.

As to the liability of partners.

[14]

Partnerships are more or less limited in the extent of their objects, for persons cannot be partners in all the transactions of life. The term general partnership is used to designate a partnership extending to the general course of dealing in a trade or profession, as distinguished from a partnership in a single or particular transaction only. The principles applicable to both are for the most part the same, though, in certain cases, a difference exists in the extent of the partners' responsibility to third persons. Thus, though, as we have seen, where a person who is general partner with another without his authority, subscribes the name of the firm to a note or bill, in a transaction unconnected with the partnership, the non-concurring partner is liable on the bill in the hands of an innocent holder; yet it has been ruled, that, where persons are partners in a particular transaction only, and not general partners in trade, one of them is not liable even to a *bonâ fide* holder of a bill given by the other, in a matter unconnected with the joint concern. *Williams* v. *Thomas*, 6 Espin. 18; see also *Baker* v. *Charlton*, Peake, 80, 10 Barn. & Cress. 294.

Extent of partnerships.

Where several partnerships, consisting partly of the same and partly of different individuals, trade under the same name, a bill issued by one of them binds only the firm issuing it, in the hands of the party to whom it is given, and who, of course, knows the particular firm by which it was issued. But it was ruled by Lord *Kenyon*, that a *bonâ fide* holder, unacquainted with this fact, might, at his option, select any one of the firms as his debtor. *Baker* v. *Charlton*, Peake, 79. Lord *Eldon* seems to have

doubted this: at all events, his Lordship was clearly of opinion, that the creditor could not proceed against more than one; and this, and this only, was the point *decided* by his Lordship. *M'Nair* v. *Fleming*, Dom. Proc. 1813, 1 Mont. Part. 37, n.

Whether partners bound by a guarantee.

Mr. Gow has treated it as doubtful, whether an individual partner can bind the firm by a guarantee or undertaking to be answerable for the debt or responsibility of another. Treat. Partn. 73. The point, it is conceived, depends entirely upon the fact, whether the guarantee was given in a matter relating to the partnership. If so, there can be no doubt that the firm is bound. This was distinctly admitted by Lord *Mansfield*, in *Hope* v. *Cust*, cit. 1 East, 53, though the guarantee, in that case, being given by a partner on behalf of the firm, to secure a separate debt of his own, clearly was not obligatory upon the firm. And Lord *Eldon*, in a late case, stated the distinction to be, that a partner has no right to guarantee a separate transaction at the expense of the other partners, where they are not concerned; *but that a partner may give a guarantee for his partners, in a matter that relates to the partnership. Ex parte Rolfe*, 2 Gly. & Jam. 306. And his Lordship considered it to be clear, in *Ex parte Gardom*, 15 Ves. 286, that a firm was bound by a guarantee, which, it is to be presumed, (though the fact is not stated), was given in a transaction connected with the partnership. Nor is Lord *Ellenborough's* decision in *Duncan* v. *Lowndes*, 3 Camp. 478, at variance *with the rule just noticed; for, though [*15] his Lordship nonsuited a plaintiff in an action against partners, on a guarantee given by one of them, without special authority, for the payment of a bill of exchange; yet there was an absence of all evidence that the transaction was connected with the partnership; and his Lordship remarked, that it was not usual for merchants, in the common course of business, to give collateral engagements of this sort, *and there was no proof of a previous course of dealing in which such guarantees were given.*

Of course, if the other partners adopt the guarantee, they are concluded from objecting to the want of authority in the person giving it; and Lord *Eldon* has laid it down, that, if partners are informed of such a measure having been taken by their partner, though, perhaps, not in that particular transaction, and they do not think proper to state whether they authorized such partner so to act or not, it is not too much to take it for granted that they accede to the guarantee which their partner has proposed. *Ex parte Nolte*, 2 Glyn & Jam. 306. And a partner will be bound by a guarantee given in reference to business actually transacted by the firm, though the business so transacted was out of the ordinary course of their partnership business. Thus, where A. and B., being partners as navy agents, negotiated an annuity for C., and B., for a certain commission, in the name of the house, guaranteed the payment of the annuity; it was held, that, though it was no part of the business of navy agents to negotiate annuities, yet, as A. was cognizant of the transaction of the purchase of the

annuity in relation to which the guarantee was given, though ignorant of the guarantee itself, he was bound. *Sandilands* v. *Marsh*, 2 Barn. & Ald. 673.

One partner cannot bind another by deed.

The rule is well known, that one partner cannot bind another by deed. (*Vide ante*, Vol. 5, p. 142). In order to make the deed of an individual partner obligatory on the firm, there must be a special authority, which authority should be also contained in an instrument under seal; and a subsequent recognition by the non-executing partner of his having authorized the act, will not be sufficient, unless the authority under seal be produced. *Steigletz* v. *Egginton*, Holt, 141. In *Burton* v. *Burton*, 1 Chitt. 707, indeed, it was held that a warrant of attorney, under seal, executed by one partner, with the oral consent of the other, bound the latter; but the ground of the decision seems to be, that sealing was not essential to the instrument. See *Kinnersley* v. *Mussen*, 5 Taunt. 264. Perhaps this reason is not very satisfactory: at all events, it shews that the case does not impugn the rule in question. The rule is also untouched by the cases deciding that a deed executed by one partner on behalf and in the *presence* of another, is binding on both, (*vide ante*, Vol. 5, p. 142; *Burn* v. *Burn*, 3 Ves. 583), as it is considered that the presence of the latter makes it his own personal act, and that the deed is in effect executed by both. There are, however, two exceptions to the rule under consideration: *First*, in matters connected with bankruptcy, in which, for obvious reasons of *convenience, a partner is competent to do various acts by deed on behalf of the firm, as to enter into the bond to the Lord Chancellor; *Ex parte Hodgkinson*, 19 Ves. 291; *Ex parte Peele*, Buck, 457; or, either by himself or his attorney, to vote in the choice of assignees, or sign the bankrupt's certificate; *Ex parte Mitchell*, 14 Ves. 597; *Ex parte Hall*, 17 Ves. 62; and even one assignee of a bankrupt may, it seems, do these acts on behalf of the whole. *Ex parte Blakey*, 1 Glyn & Jam. 197. The other exception applies to the case of a release by one partner of a debt due to the firm, which, though under seal, is conclusive against all the partners; the power to release being incidental to and included in the power to receive a debt which each partner possesses; and, in personal actions, the rule being, that a release by one plaintiff operates as a release by all; *Tooker's* case, 2 Rep. 68; and one plaintiff is estopped from shewing that it was given by another without consideration, or in contravention of the existing stipulations between them. *Acton* v. *Booth*, 4 J. B. Moore, 192; *Furnival* v. *Weston*, 7 Id. 356; see also *Legh* v. *Legh*, 1 Bos. & Pul. 447. Nothing but a strong case of fraud and collusion between the debtor and the releasing partner (as, where the assignor of a bond released an action brought by the assignee in his name, *Legh* v. *Legh*, 1 Bos. & Pul. 447), will prevent the operation of the release at law. *Jones* v. *Herbert*, 7 Taunt. 421. But this rule is founded solely on the solemnity of the instrument, which makes it a bar to the action; and, therefore, if the debtor

Exception in bankruptcy.

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—Release by one partner binding on the firm.

give in evidence a *receipt*, which is not pleadable as a bar to the action, but is only a mode of proving payment; it may be shewn to have been given by one of the plaintiffs without consideration, *Skaife* v. *Jackson*, 3 Barn. & Cress. 421, which seems to overrule the doctrine advanced by Lord *Ellenborough* in *Henderson* v. *Wild*, 2 Campb. 561.

Deed binding on executing partner.

It should be noticed that a deed executed by a person on behalf of himself and his partners will be binding on him, though void as to them; *Elliot* v. *Davis*, 2 Bos. & Pull. 338; *Hawkshaw* v. *Parkins*, 2 Swanst. 543; but if executed by him as an individual partner only, and not professedly on behalf of the others, it seems, he will not be bound unless the others execute, the execution of each being presumed to be upon the faith that the other partners are to be equally bound. See *Antram* v. *Chase*, 15 East, 209.

Remedies between, by, and against partners.

For a particular statement of the remedies at law and in equity between partners *inter se*, and by and against them and third persons, the reader should consult the treatises on partnership and pleading. The legal remedies are now little resorted to. The action of account is quite obsolete; and actions of covenant for a breach of the partnership stipulations, where the partnership subsists under a deed, and of *assumpsit* where it does not (Gow, 84), are not frequent; unless, indeed, where articles contain an agreement by one partner to pay to another a specific sum of money, as the consideration for the purchase of a share in the business, or otherwise. *Walker* v. *Harris*, 1 Anstr. 245. And it should be observed, that one *partner cannot maintain an action of *assumpsit* against another, to recover [* 17] a proportion of a particular sum of money which the latter may have received, or the former may have paid, on their joint account, or which may be owing to the claimant for professional services rendered to the partnership in his separate capacity. *Holmes* v. *Higgins*, 1 Barn. & Cress. 74; *Milburn* v. *Codd*, 7 Id. 419. In order to entitle him to recover in such action, there must have been a general settlement of accounts, and a balance struck. See *Foster* v. *Allanson*, 2 D. & E. 479. For, if a partner has advanced monies, or rendered services in his separate capacity, to the partnership, this merely forms an item in the general account between them; and it cannot be known, until a balance has been struck, whether any thing is due to him in respect of such particular transaction (*a*). It may be observed, too, that one partner cannot maintain an action of trover against another in respect of a specific chattel belonging to the partnership, (the possession of one joint tenant or tenant in common being the possession of both, *Brown* v. *Hedges*, 1 Salk. 290), unless in case of its

(*a*) The rule in equity is, that a partner will not be compelled to pay into Court a particular sum received by him, if he insists that there is a balance in his favour, unless it has been received by him in an improper manner. *Foster* v. *Donald*, 1 Jac. & Walk. 252.

Whether a partner, who has paid a joint debt, can maintain an action for contribution.

destruction by the latter, which, being a wrongful conversion, would support the action. It is said, however, by a respectable writer, that "in an action of *assumpsit* for money paid to his use, one partner may enforce from his co-partner contribution towards a debt which the single partner may have discharged, but to which the firm was formerly liable. *Abbot* v. *Smith*, 2 Sir W. Blackst. 947—*Per* Lord *Kenyon* in *Merryweather* v. *Nixan*, 8 D. & E. 186; *Evans* v. *Yeatherd*, 2 Bing. 133." Gow, Partn. 90. This exception to the general rule, if established, seems not to rest on very satisfactory grounds; for it is obvious, that a partner may have paid a particular debt owing by the firm, and yet be its debtor upon the general account; and the consequence of the doctrine would be very inconvenient, inasmuch as the payment of every single debt by one partner would create a distinct cause of action between the partners, which would lead to interminable litigation. Nor is the position in question, it is conceived, supported by authority; none of the cases cited by Mr. Gow bear directly upon the point. The case of *Abbot* v. *Smith* was an action by a creditor of the firm against a single partner; and it was held, that the liability of the co-contractor not having been pleaded in abatement, was no defence to the action. In *Evans* v *Yeatherd*, (also reported 9 J. B. Moore, 272), it was merely decided, that a person who alleged himself to be a partner with the defendant, was an incompetent witness for him, on account of his interest in the suit, because, if the plaintiff recovered a verdict, the defendant would be entitled, "either at law or *in equity*," (for such are the words of
[*18] the *Lord Chief Justice) to call on the witness for contribution. In the case of *Burnell* v. *Minot*, 4 B. Moore, 340, also cited by Mr. Gow elsewhere, there was no general partnership between the plaintiff and defendant, but one had simply paid a sum of money for damages (ascertained by an arbitrator) on account of the breach of a certain joint contract entered into by them: and the Court held, that an action for contribution might be maintained, carefully avoiding the general question, which had been discussed at the bar, whether an action for money paid was maintainable by one partner against another on a joint contract. So, Lord *Kenyon's dictum* in *Merryweather* v. *Nixan*, merely affirmed the right of one defendant to recover contribution against another, for damages recovered against them jointly in an action of *assumpsit*, as distinguished from an action of *tort*, and no allusion is made to the case of a trading partnership. It is obvious, that where persons are partners in a single transaction, the payment of a sum of money by one, on their joint account, may create as clear a cause of action against the other as a settled account between general partners. In such a case, and such only, it is submitted, an action for contribution lies.

Enough has been said to shew that Courts of law are ill adapted to administer effectual justice between litigant partners, from their incapacity to unravel intricate accounts, and compel disclosures upon oath—purposes

that can only be effected in a Court of equity; which, therefore, has become the ordinary tribunal for the adjustment of partnership differences.

Equity will decree the execution of articles of partnership.

A Court of equity, it seems, will entertain a suit to enforce the specific performance of an agreement to enter into articles of partnership. See Lord *Hardwicke's* judgment in *Buxton* v. *Lister*, 3 Atk. 385. But clearly not, where the effect of the articles, if executed, would be to create a partnership that might be dissolved immediately by either party. Thus, where A., B., and C., by deed, in 1787, entered into partnership, as bankers, for ten years, and the deed provided, that if either of them should, after the expiration of that partnership, continue to carry on the business of a banker, either alone or in partnership with any other person, until any one or more of the parties to the indenture should have a legitimate or an illegitimate son, whom the father should, by writing or by his will, desire to have introduced to the said business, and who should live to attain the age of sixteen, the party or parties to the indenture, who should so carry on the said business of a banker, should take such son apprentice for five years, and then should receive him into the partnership then carried on by any of the parties, and admit him to an equal share with the then partners, so soon after his age of twenty-one as might be, but not till after twenty years from the date of the indenture. The business was carried on till the death of A., in 1794, and afterwards by the survivors. A., in pursuance of the power in the articles, appointed an illegitimate son to be bound apprentice in 1802, when he would be sixteen, and afterwards to *be admitted into the partnership, according to the articles. A bill was [*19] filed by this son against the partners, praying a specific performance of the partnership deed, and that the defendants might be decreed to take him apprentice, and, at the expiration of the apprenticeship, admit him to an equal share of the business. Lord *Eldon* was of opinion, that this was such a covenant as the Court could not specifically execute. No one, he said, had ever heard of the Court executing an agreement for a partnership, which the parties might dissolve immediately afterwards. *Hercy* v. *Birch*, 9 Ves. 357 (*a*).

Bill for an account may be maintained without praying a dissolution.

Whether a partner could file a bill for an account, without praying a dissolution of the partnership, was long *vexata quæstio*. In *Forman* v. *Homfray*, 2 Ves. & Bea. 329, Lord *Eldon* distinctly intimated an opinion in the negative, his Lordship remarking on the inconvenience of allowing partners to come annually to the Court for an account. Sir *J. Leach*, V. C., however, in *Harrison* v. *Armitage*, 4 Madd. 143, expressed a decided opinion that such a bill might be maintained; and his Honour said, that *Forman* v. *Homfray* applied only to a case of interim management, which would not be granted, unless the bill prayed a dissolution of

(*a*) As to the rule that partnerships for any indefinite period may be dissolved immediately, *vide post*, p. 26.

the partnership. As the Vice-Chancellor, however, was of opinion that there was no partnership, the point did not arise. See also *Glassington* v. *Thwaites*, 1 Sim. & Stu. 124. Any suit, which would involve the Court in the management of the partnership affairs, clearly cannot be entertained; and the Court, therefore, will not appoint a receiver, unless the bill is so framed that a decree can be made at the hearing, either that the concern shall be carried on according to the terms of some instrument, which, by the agreement between the parties, was to regulate the mode of its being carried on; *Const* v. *Harris*, Turn. & Russ. 517; or, unless the bill pray a dissolution of the partnership; nor even then, if it be doubtful whether a dissolution will be ultimately decreed or not. *Goodman* v. *Whitcombe*, 1 Jac. & Walk. 589; *Chapman* v. *Beach*, Id. 594. And the circumstance of there being a covenant in the articles, that, if the parties cannot agree, the Lord Chancellor shall appoint a manager, will not induce the Court to act. *Waters* v. *Taylor*, 15 Ves. 25. In the case of *Marshall* v. *Colman*, 2 Jac. & Walk. 266, Lord *Eldon* refused to grant an injunction to restrain a partner from violating a particular covenant in the articles, the bill not praying a dissolution. "It would be," his Lordship said, "quite a new head of equity, for the Court to interfere where one party violates a particular covenant, and the other party does not choose to put an end to the partnership; in that way, there might be a separate suit and a perpetual injunction in respect of each covenant."

But equity will not carry on a partnership.

The last case in which the doctrine in question was agitated, is *Loscombe* v. *Russell*, 4 Sim. 8; where a bill being filed by some members of a partnership firm against the others, praying an account of the dealings and transactions of the partnership since a given period, the defendants put in a general demurrer, which was allowed by Sir *L. Shadwell*, V. C. His Honor said, "There is no instance of an account being decreed of the profits of a partnership on a bill, which does not pray a dissolution, but contemplates the subsistence of the partnership. The opinion of Lord *Eldon* upon this subject has been, from time to time, expressed both before and since the decision of *Harrison* v. *Armitage*. Suppose that the Court would entertain a bill like the present, and direct an account to be taken of the dealings of a partnership, and that it appeared by the Master's report, that a balance was due from the defendant to the plaintiff, then, upon further directions, the plaintiff would ask for an order, that the balance might be paid to him; it would, however, be competent to the defendant to file a supplemental bill, in order to shew that, since the account was taken, a balance had become due to him from the plaintiff, after giving the plaintiff credit for the amount found due to him by the Master; and thus the matter might be pursued with endless changes, and supplemental bills might be filed every year that the partnership continued, and a balance would never be ascertained till the partnership expired, or the Court put an end to it."

With respect to actions by a partnership against third persons, and *è converso*, the following distinction should be noticed: where the partners are *plaintiffs*, if all do not join, this fact may be given in evidence under the *general issue, and will be a good defence to the action (*a*). Where the partners are *defendants*, if any partner be not joined, this must be pleaded in abatement, and can be taken advantage of in no other way. So, in an action *by* a surviving partner, the declaration must describe him as such. *Jell* v. *Douglas*, 4 Barn. & Ald. 374. But, in an action *against* a surviving partner, this is not necessary. *Richards* v. *Heather*, 1 Barn. & Ald. 29. It has been decided that a defendant may plead the liability of a dormant partner in abatement. *Dubois* v. *Ludert*, 5 Taunt. 609. But the contrary has been strenuously maintained by Lord *Eldon*, who has repeatedly laid it down, that though a creditor *may* make his demand upon a dormant partner, he is not bound to do so. See *Ex parte Hamper*, 17 Ves. 405; *Ex parte Norfolk*, 19 Ves. 458; *Ex parte Matthews*, 3 Ves. & Bea. 126 (*b*). And no dealing with the ostensible party as the sole debtor, while the creditor was ignorant of the interest of the concealed partner, will discharge the latter. *Robinson* v. *Wilkinson*, 3 Price, 538. Again, it is clear, that an infant partner need not be, and ought not to be, included in an action *against* the firm. *Burgess* v. *Merrill*, 4 Taunt. 468. And the infancy may either be pleaded in abatement, or given in evidence under the general issue. *Season* v. *Gilbert*, 2 Lev. 144; and see Gow, Partn. 194. But he must be joined in an action *by* the firm; *Teed* v. *Elworthy*, 14 East, 210; though it should seem, that, in this and other cases, evidence may be adduced, that an apparent partner, not joined as plaintiff in the action, had really no interest, Ib., which fact may be proved by the testimony of the ostensible partner himself. *Kell* v. *Nainby*, 10 Barn. & Cress. 20. But, though an infant is incapable of binding himself by contract, either with his partners or with third persons, and, therefore, may, at his majority, dissolve the partnership, see *Holmes* v. *Blog*, 1 J. B. Moore, 466; yet, if he has openly acted as partner, he is bound, when of age, by some positive act to disaffirm the partnership; and his neglect to do so renders him liable for the subsequent engagements of the firm; for the fact of his non-interference since he attained his majority, is not sufficient to discharge him. *Goode* v. *Harrison*, 5 Barn. & Ald. 147.

As to actions by and against partners.

[*20]

As to infant partners.

The interest which partners have in the partnership effects is frequently

Nature of part-

(*a*) The distinction is, that where the cause of action arises *ex contractu*, a plaintiff is bound to sue all the contracting parties; where it arises *ex delicto*, he may sue all or any of the parties. *Mitchell* v. *Tarbutt*, 5 D. & E. 469.

(*b*) But would this apply, if it were proved that the plaintiff knew of the partnership, in which case the partner would not be dormant as to him?

ners' interest in the property.

defined to be a joint tenancy without benefit of survivorship. Wats. Partn. 65; and see Gow, Partn. 47; *Aunand* v. *Honiwood*, Cas. Ch. 129; *Jeffreys* v. *Small*, 1 Vern. 217, 2 Mont. Part. 3. But, to render this definition correct, the words "*inter se*" should be added to "benefit of sur-

[*21] *vivorship;" for, in regard to third persons, there *is* survivorship between the partners. Thus, a surviving partner may sue for the joint debts, without joining the representatives of the deceased partner, though he could not have sued alone, during the life of his partner. At law, too, the obligations of partners survive; it is in equity, only, that the property of the deceased partner can be made available to the partnership engagements. They cannot be joined with the surviving partner in an action. Nor is it accurate to describe partners as tenants in common of the partnership property; for, with regard to third persons, each is possessed of and has the absolute *jus disponendi* over the whole property, and not an *aliquot* share or interest only; and, *inter se*, each has a claim, not to any specific share or interest of the property *in specie*, but to the pecuniary balance which shall be found to be due to him upon the final adjustment of accounts, after the conversion of the assets, and the liquidation thereout of all claims upon the partnership. See Lord *Mansfield's* judgment in *Fox* v. *Hanbury*, Cowp. 445.

Interest of partners in real estate.

Where real estate is purchased with partnership funds, or for partnership purposes, and conveyed to the partners as joint tenants, the legal estate, of course, vests in the survivor, but who is, in equity, upon the principle just adverted to, a trustee for the representatives of the deceased partner, *Lake* v. *Craddock*, 3 P. W. 158, and would be restrained from availing himself of his legal title to obtain possession by ejectment. *Elliot* v. *Brown*, 3 Swanst. 489, n. and see *Lyster* v. *Dolland*, 1 Ves. junr. 435. And the same rule is applicable to property to which persons have become entitled in joint tenancy, by devise or other voluntary gift, provided they enter into trade together, and use the property for a series of years, for the purposes of such trade. The question, in such case, is, whether the joint dealing has been such as to convert the estate into partnership property; and, if this fact is doubtful, the Court will direct an issue. *Jackson* v. *Jackson*, 2 Ves. 591. Of course, if an estate be purchased out of a partnership fund, with an express agreement that it shall be considered as the exclusive property of one of the partners, to whom the conveyance is made, this will exclude the implication of a trust for the partnership, and the purchasing partner will be its debtor for the price. *Smith* v. *Smith*, 5 Ves. 193. In a recent case a testator (who was a farmer) devised and bequeathed all the residue of his real and personal estates to his two sons. The devisees for many years carried on their father's business upon the devised property, and kept their incomes in one common stock, to which each had access, but neither of them ever accounted to the other out of the produce of their father's property; and with the profits of

the business they, from time to time, purchased several estates. It was held that they continued joint tenants of the property derived under the will, and were tenants in common of the purchased property. *Morris* v. *Barrett*, 3 You. & Jerv. 384.

Whether real estate goes to real or personal representatives of the partners.

The usual course in conveying real estate, purchased by a partnership, is, to vest it in a trustee, in trust, to be used and disposed of for the purposes of the partnership; and it is proper to insert a declaration in the purchase deed, that the property shall, as between the real and personal representatives of the partners, be personal estate, in order to avoid the perplexing question, to which class of representatives it belongs—a question on which it will be seen the authorities are conflicting, though the latest determination is in favour of the personal representatives, in subversion of the doctrine advanced by Lord *Thurlow*, and confirmed by Sir *Wm. *Grant*, in the three following cases. Thus, in the case of *Thornton* v. *Dixon*, 3 B. C. C. 198, where A., B., and C., in 1761, being seised in fee of some land, called Broadmoor, entered into partnership for twenty-one years, as paper-makers, and mills were erected upon the land, and they declared the use of the land to themselves in fee, as tenants in common. In 1764, they entered into another partnership for twenty-one years, by deed, taking in four new partners, D., E., F., and G., in different proportions; and in the partnership deed there was a covenant from the three original partners, to stand seised of the land, in trust for the co-partnership, in the proportions in which they were respectively interested therein. During the second partnership they bought a freehold messuage, with a little land adjoining, called Meerbeek, for the better carrying on the trade, which was enjoyed by the partners, as joint tenants. The question was, as to the equitable quality of Broadmoor and Meerbeek, as between the real and personal representatives of a deceased partner: upon the first argument, Lord *Thurlow* said, he had always understood, that where partners bought lands for the purpose of a partnership concern, it was to be considered as part of the partnership fund, and that, consequently, Broadmoor and Meerbeek must be considered as personal estate, and distributable as such. Upon further argument, however, his Lordship thought, that, had the agreement been, that the mills should be valued and sold, it would have converted them into personalty of the partnership; *but, the agreement in this case was not sufficient to vary the nature of the property; and therefore, after the dissolution, the property would result according to its respective nature: the real as real, the personal as personal, estate.* So, in *Bell* v. *Phyn*, 7 Ves. 453, where A., B., and C., carrying on business in partnership, as merchants, in London, in 1791, joined with D. in the purchase of a plantation in Grenada, with the stock, &c., for the sum of 21,000*l.*, of which sum 4,000*l.* was paid out of the partnership funds, by A., B., and C., and the remainder was secured by bond and mortgage. The estate was conveyed, in trust, to secure to

[*22]

Case of *Thornton* v. *Dixon*.

Case of *Bell* v. *Phyn*.

D. (who appears to have advanced all the purchase-money beyond the 4,000*l.*) his heirs, executors, administrators, and assigns, 21,000*l.*, and D. conveyed and assigned to A., B., and C., their heirs, executors, administrators, and assigns, two thirds of the estate and stock, subject to the payment of 12,666*l.* 13*s.* 4*d.*, the residue of the purchase-money, for their two-thirds. The accounts relating to the estate were kept in the partnership books. On the death of A., his share of the estate was claimed by his personal representatives as personal estate; Sir *Wm. Grant*, M. R., was of opinion, that even admitting this estate to be clearly partnership property, yet, nothing having been done by the partners to alter the nature of it, he was bound, by the authority of the case of *Thornton* v. *Dixon*, to say, that it was of the nature of real estate, and belonged to the heir, subject to the widow's dower. Again, in the case of *Balmain* v. *Shore*, 8 Ves. 500, *where A., B., and C., being partners, as potters, in 1780, purchased a china and pot manufactory, and other premises; and by a deed executed by them and the vendor, it was declared, that the person seised of the legal freehold should stand seised, in trust for the vendor and his heirs, subject to redemption on payment of 134*l.* (the residue of the purchase-money remaining unpaid) and interest, and on payment thereof, to the use of A., B., and C., and their heirs and assigns, as tenants in common. The indenture then declared that the premises should be used in the partnership trade during the continuance of the partnership, and, to that intent, the partners covenanted not to dispose of their interest during such period. The purchase money for the estate was paid, not out of the partnership funds, but out of the separate property of the respective partners. One of the questions in this case was, whether, on the death of one of the partners, his share in this estate was to be considered as real or personal property. "After the case of *Thornton* v. *Dixon*," said Sir *Wm. Grant*, M. R., "that is not a question that admits of argument; for this is rather a stronger case for the heir than that; there it was purchased generally, applied to the uses of the partnership, and apparently was purchased for no other end; yet it was considered to be real estate by Lord *Thurlow;* here the parties have limited and defined the extent of the interest the partnership was to have in the real property: considering themselves as owners of the real estate as tenants in common, they stipulate that the partners shall have a certain ownership, notwithstanding that interest in them as tenants in common in fee: the premises are to continue to be used in the trade as long as the partnership lasts; they can claim nothing as partners, except through the covenants; subject to the covenants it goes as real estate. Whether the heir can derive any benefit is another question. The question for my decision is only whether I can declare this real estate to be personal property, to go as the shares of the partnership—that, I am of opinion, I cannot declare."

Case of *Balmain* v. *Shore*. [*23]

These cases might seem to have settled the point in favour of the heir,

but a contrary doctrine has since been held by Lord *Eldon;* for, though his Lordship's observations in *Stuart* v. Marquis of *Bute,* 11 Ves. 665, afforded ground to infer his acquiescence in the principle of Sir *Wm. Grant's* decisions, yet, it was evident, from what fell from him on other occasions, (see *Crawshay* v. *Maule,* 1 Swanst. 508, 521), that he considered the point as unsettled; and, at length, in the case of *Townsend* v. *Devaynes,* (for the report of which, as well as of many other valuable cases, the profession is indebted to Mr. Montagu) Mont. Part. (in notes), 97, his Lordship decided, that real estate, purchased for partnership purposes, was impressed with the quality of personal estate, so as to belong, at the death of a partner, to his personal representatives. The case was shortly, as follows: in 1801, A., B., C., and D., agreed to carry on the trade of paper makers, in co-partnership, with a capital of 15,000*l.*, which was to *be advanced by the partners in certain proportions. They afterwards [*24] contracted for the purchase of certain freehold and copyhold tenements, for the sum of 10,200*l.*; part of which purchase-money was agreed to be paid out of the proposed capital of 15,000*l.*, and the residue, amounting to 6,000*l.* was to remain on mortgage. In pursuance of this contract, proper deeds of conveyance were executed to the partners, and they were let into possession, and the premises were made use of from the time of the purchase for the purposes of the partnership only, and the value thereof taken into, and considered as part of, their stock and capital, in stating the yearly balances. B., one of the partners, died, leaving a will not sufficiently attested to pass his real estate, and the question arose between his heir-at-law and executors, whether his share in the mills, or rather the sum for which it had been sold, belonged to the one or the other. The Master, under an order of the Court, dated 24th of May, 1808, had reported in favour of the heir, treating the produce of the sale as realty; which report was excepted to on the ground, that the Master "ought to have certified, that the sum for which the share had been sold arose from personal estate." The Lord Chancellor (*Eldon*), after a full argument, (but of which, unfortunately, we have no report), *allowed the exception.*

Case of *Townsend* v. *Devaynes.*

Real estate of partnership held to belong to the personal representatives of the partners.

In corroboration of the doctrine of this case, his Lordship, in *Selkrig* v. *Davis,* (1814), 2 Dow, 231, declared his own individual opinion to be, "*that all property involved in a partnership concern ought to be personal.*"

II. DISSOLUTION OF PARTNERSHIP.

We have now to inquire by what means a partnership may be dissolved, and to state some of the consequences of its dissolution.

There are various ways by which a partnership may be dissolved—efflux- By what means a partnership

may be dissolved—
Death; bankruptcy; mutual agreement.

rates like death, or mutual agreement. But in no one of these cases can it be said, that to *all* intents and purposes the partnership is dissolved, for the connection still remains until the affairs are wound up. (*Beak* v. *Beak*, 3 Swanst. 627). The representative of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor of the solvent partner; but still, in either of those cases, that community of interest remains, that is necessary until the affairs are wound up; and that requires that what was partnership property before, shall continue so, for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves require. And it is through the operation of administering the equities, as between the partners themselves, that the creditors have this opportunity; as, in the case of death, it is the equity of the deceased partner that enables the creditors to bring forward the distribution. The creditors are not injured by the agreement

[*25] *of partners to dissolve the partnership, and (the contract) that, from that time, what was joint property shall become the separate property of one, notice of the dissolution being given; as either a consideration is paid, or, which for this purpose is equal to a consideration, a covenant is entered into to pay the debts, and indemnify the retiring partner, so conceived as not to leave any lien upon the property. *Per* Lord *Eldon*, in *Ex parte Williams*, 11 Ves. 5.

Execution by *fieri facias*.

An execution, under which a partner's share is seized and disposed of, is also a dissolution, and the vendee of the sheriff is tenant in common with the other partner. See Gow, Partn. 251.

Marriage of *feme sole*.

The marriage of a *feme sole* partner is, it should seem, a dissolution of a partnership, as it would introduce a stranger into the concern. See 1 Swanst. 517, n., Gow, 248.

Whether death, &c. of one, is a dissolution as to all.

A doubt formerly prevailed whether a partnership between more than two persons was wholly dissolved by the death or bankruptcy of one, or continued as to the surviving or solvent partners. Lord Chancellor *Cowper* seems to have inclined to the latter opinion; see *Wrexham* v. *Hudleston*, 1 Swanst. 516; but Lord *Eldon* has, on several occasions, distinctly laid it down, that the "destruction" of one operates as a dissolution with respect to the whole. See *Crawshay* v. *Collins*, 15 Ves. 228; *Kinder* v. *Taylor*, Gow, Partn. 240; also *Ex parte Williams*, 11 Ves. 5, *supra*. And this seems to be reasonable, for, a contract to become partner with three persons, does not necessarily include an agreement to continue partner with two of those three, after the dereliction of one, confidence in whom might have been the principal inducement to the connection. But it seems that a provision in partnership articles, that, upon the decease of one, the surviving partners shall take his share at a valuation, would be construed as an implied agreement, that a partnership should subsist among the survivors. *Wrexham* v. *Hudleston*, 1 Swanst. 516, n. Such an agreement, it is obvious, constitutes a new partnership, and is not

(as the term "continuing" partners, ordinarily used, would seem to imply,) a prolongation of the existence of the former partnership; though, as the new partnership would be considered as impliedly, if not expressly, subsisting under the same stipulations as the former, the distinction is not very material.

Lunacy of partner not a dissolution *per se*.

It is clear that the lunacy of a partner, *per se*, does not work a dissolution, nor does it enable the other partners, by their own act, to dissolve the partnership; to effect which, recourse must be had to a Court of equity, (see *Wrexham* v. *Hudleston*, 1 Swanst. 516, n.; *Waters* v. *Taylor*, 2 Ves. & Bea. 303; *Sayer* v. *Bennett*, 1 Cox, 107, *S. C.*, Wats. Partn. 382), which, in the exercise of its jurisdiction in these difficult and delicate circumstances, will take into its consideration the degree and probable duration of the malady with which the party is affected, 2 Ves. & B. 303, and also the nature of the duties stipulated to be performed by him. If the lunatic were the acting *partner, the ground for dissolving the partnership [*26] is, obviously, much stronger than where he contributed capital only, or principally. *Sayer* v. *Bennett*, 1 Cox, Ch. Cas. 107; see, also, *Pearce* v. *Chamberlain*, 2 Ves. senr. 35. But in either case the lunatic would be entitled to his share of the profits, which will be distributed according to the interests of the partners, until the dissolution. See 1 Cox, 110.

Upon what grounds Courts of equity dissolve partnerships.

It is impossible to enumerate all the circumstances which would induce a Court of equity to dissolve a partnership; but it may be stated generally, that whatever renders it impossible that the partnership should beneficially continue, would be a ground for such a proceeding; such as the impracticability of the scheme in which the parties had engaged, *Baring* v. *Dix*, 1 Cox, C. C. 213; such conduct of one of the partners as precluded the carrying on the concern under the stipulated terms, *Waters* v. *Taylor*, 2 Ves. & Bea. 304; or, as amounted to an entire exclusion of the other from an interest in the business, 1 Jac. & Walk. 593; or, (which is always a strong ground for appointing a receiver, *Const* v. *Harris*, Turn. & Russ. 525), to a gross breach of faith between the parties, 1 Jac. & Walk. 594, as that of raising money for his private use on the credit of the firm. See *Marshal* v. *Coleman*, 2 Jac. & Walk. 268. These, and many others which might be suggested, would clearly induce the Court to dissolve the partnership at the instance of any one or more of its members. But slight circumstances of misconduct, or mere difference of temper alone, are not sufficient; *Goodman* v. *Whitcomb*, 1 Jac. & Walk. 592; *Chapman* v. *Beach*, Id. 594; for, as Lord *Eldon* laconically remarked in a recent case, "where partners differ, as they sometimes do when they enter into another kind of partnership, they should recollect, that they enter into it for better and worse; and this Court has no jurisdiction to make a separation between them, because one is more sullen or less good tempered than another." 1 Jac. & Walk. 592. Violent and lasting dissension, however, seems to be a ground upon which a Court of equity will decree a dissolution; as where

the parties refuse to meet each other upon matters of business—a state of things which precludes the possibility of the partnership business being conducted with advantage. *De Berenger* v. *Hammel, cor.* Sir *L. Shadwell,* V. C. 13 Nov. 1829, MS., (in which case *Waters* v. *Taylor* was considered by his Honour as an authority for the dissolution under such circumstances).

Indefinite partnerships dissoluble by either party.

It should be observed, that mutual consent, or the decree of a Court of equity, is only requisite to effect the dissolution of a partnership, the term of which is fixed by express stipulation, and not of one that is indefinite in its duration, which may be dissolved at the option of either party at any time, and without any preliminary notice. See *Peacock* v. *Peacock,* 16 Ves. 56; *Featherstonhaugh* v. *Fenwick,* 17 Ves. 307; and see *Master* v. *Kirton,* 3 Ves. 74; *Rackstraw* v. *Imber,* Holt, 368. And the existence of engagements with third persons forms no obstacle to the exercise of this power of dissolution by either party, as the dissolution would, of course, not affect those engagements; and since partners are necessarily entering into such contracts *de die in diem,* this, if allowed to prevail, would prevent the partnership from ever being dissolved. It has been [*27] *held, too, that the circumstance of the partners having, for the purposes of their trade, made a joint purchase of a leasehold property, is no evidence of an intention that the partnership shall be commensurate in duration with the leases; *Featherstonhaugh* v. *Fenwick,* 17 Ves. 308; though, unquestionably, partners *may* so purchase leaseholds as to imply such an agreement. See *Crawshay* v. *Maule,* 1 Swanst. 521. It does not often happen that indefinite partnerships are created by deeds which have been prepared by professional persons, whose attention would, of course, be directed to the inquiry as to the proposed period of its duration. Such partnerships, however, frequently exist under contracts framed by parties themselves, or where persons enter into partnership without any written agreement.

It remains to be observed, that a bill for a dissolution is not demurrable to, on the ground that the plaintiff might have dissolved the partnership by his own act, if it prays, as such bills almost invariably do, other relief, as the appointment of a receiver, and to restrain the defendant from receiving the partnership debts, &c. *Master* v. *Kirton,* 3 Ves. 74. (It is not a matter of course for the Court to grant an injunction to restrain a partner from receiving the partnership debts after a dissolution; and where the complainant had himself been guilty of misconduct, such as that of violently taking away the partnership books, the Court refused the injunction. *Littlewood* v. *Caldwell,* 11 Price, 99).

Rule, where continuing partners trade with the deceased partner's capital.

It should be observed, that, though a partnership is *ipso facto* determined by the death or bankruptcy of any one or more of its members, yet, if the surviving or continuing partners carry on the trade with the capital of the deceased or bankrupt partner, instead of converting the assets, and coming

to a settlement with the executors or assignees, the latter are entitled to a rateable share of the profits during the time that the capital has been so employed, partners being under an implied obligation "to use the joint property for the benefit of all whose property it is." *Crawshay* v. *Collins*, 15 Ves. 226; *Brown* v. *De Tastet*, Jacob, 284; *Hammond* v. *Douglas*, 5 Ves. 539. But an allowance will be made to the surviving partner for his management. *Brown* v. *De Tastet*, Jacob, 284 (*a*).

The preceding observations have related to the dissolution of a partnership in regard to the partners themselves. It is requisite now to consider its effect in relation to third persons.

Rights and obligations of partners after a dissolution.

When it is said, that a partnership subsists after a dissolution, until the affairs are wound up, (*vide ante*, p. 24), the limits of this doctrine should be defined. The partners, of course, continue liable to be sued as joint contractors, upon the engagements entered into during the partnership; and, by parity of reasoning, they may receive and release the partnership credits, *and, in short, may perform any other act in relation to pre-existing [*28] debts and credits within the scope of a partner's ordinary authority, as signing a bankrupt's certificate, &c.; *Ex parte Hall*, 17 Ves. 62; *Arton* v. *Booth*, 4 J. B. Moore, 192; *Bristow* v. *Taylor*, 2 Stark. 50; *Ault* v. *Goodrich*, 4 Russ. 430; *Pritchard* v. *Draper*, 1 Russ. & Mylne, 195; and must concur in an action for the recovery of the partnership credits. See *Arton* v. *Booth*, *ubi supra*. But they cannot bring any new obligation upon each other; and, therefore, an acceptance given by one of the late partners on behalf of both, though for a partnership debt, will not bind the non-concurring partner. *Dolman* v. *Orchard*, 2 Carr. & Pay. 104. Nor will a cognovit given by one of such partners (being joint defendants in an action) for the debt and costs, as between attorney and client, bind the other. *Rathbone* v. *Drakeford*, 4 Moo. & Pay. 57. And an arrangement that one of the partners shall settle the debts and credits of the partnership, does not, it seems, invest him with an implied authority to give bills in the names of himself and his late partners, for a partnership debt. *Abell* v. *Sutton*, 3 Esp. 108. Such an arrangement, in fact, confers on him no authority which did not belong to him as partner. *Abell* v. *Sutton*, 3 Esp. 108; see also *Kilgour* v. *Finlyson*, 1 Hen. Blackst. 155, stated *ante*, Vol. 5, p. 140.

What notice of dissolution requisite. As to advertisements in the London Gazette.

Persons who have been once openly partners, continue to stand in that relation to each other in regard to transactions with the world, until the dissolution of their connection has been properly announced; and the ordinary and well-known mode of making this announcement is by an advertisement in the London Gazette, which is sufficient notice of the fact to

(*a*) *Contrà*, it seems, where it is carried on under an agreement in the partnership deed. *Burden* v. *Burden*, 1 Ves. & Bea. 170; *et vide post*, p. 33.

the public at large. *Godfrey* v. *Turnbull*, 1 Espin. 371; *Wright* v. *Pulham*, 2 Chitt. 121; but see Peake, 155, n. But the correspondents of the house are entitled to a more distinct and particular intimation. *Graham* v. *Hope*, Peake, 154, S. P. 15 Ves. 204. To them, therefore, a circular letter is usually sent, announcing the dissolution. See 3 Camp. 149; 1 Stark. 421. This being done, a seceding partner would be safe, even if his name were, without his authority, continued in the firm; for, after having used the requisite means of notifying the dissolution, he is not bound to apply for an injunction to prevent the improper retention of his name by the continuing partners. *Newsome* v. *Coles*, 2 Camp. 617. But notice in the Gazette does not exempt persons dissolving partnership from the necessity of using other reasonable precautions to prevent the public from inferring a continuance of the partnership. And, therefore, a person allowing his name to remain over the door of the late firm, continues liable, notwithstanding the advertisement of the dissolution in the Gazette. *Williams* v. *Keats*, 2 Stark. 290; *Dolman* v. *Orchard*, 2 Carr. & Pay. 104. But, where a partner notoriously withdraws his name from a firm, his liability is not continued by the circumstance that the deed by which he has professed to assign his share is void for a technical informality. *M'Iver* v. *Humble*, 16 East, 174. If knowledge of the dissolution can be brought home to the creditor, proof of a general public notice is, of course, as to him, unnecessary; and, if he could be proved to have been aware of an intention to dissolve, this would throw on him the *onus* of shewing that such intention was abandoned. *Paterson* v. *Zachariah*, 1 Stark. 71. But, *where a seceding partner's name is continued in the firm, by express agreement, he will be liable to persons acquainted with the fact of the dissolution under those circumstances, inasmuch as such an agreement implies an undertaking to continue responsible for the engagements of the firm. *Brown* v. *Leonard*, 2 Chitt. 121. The question in every case is, whether the circumstances are such as to afford reasonable ground for a jury to infer the party's knowledge of the fact of the dissolution. *Parkin* v. *Carruthers*, 3 Esp. 248. The alteration of the cheques of a banking-house would clearly be sufficient evidence of a change in the firm to persons using those cheques. *Barfoot* v. *Goodall*, 3 Camp. 147. The insertion of an advertisement of the dissolution in a newspaper, *which the party was in the habit of taking in*, is, it seems, equivalent to notice in the Gazette, that is, it would discharge the partner as to such party, unless he were a correspondent of the firm. *Jenkins* v. *Blizard*, 1 Stark. 419. Proof, however, that the party read the paper is indispensable in the case of a common newspaper, and seems to have been considered by Lord *Ellenborough* as requisite to render even an advertisement in the Gazette notice. *Jenkins* v. *Blizard*, 1 Stark. 419. But the point did not arise in the case, and it is clear that evidence of this nature would not now be required, for the publicity of advertisements in the Gazette principally arises

Liability of partners after dissolution.

[*29]

Effect of advertisements in newspapers.

from the notification given of its contents in the other newspapers, and not by means of the perusal of the Gazette itself. The subscription of a notice in the Gazette, dissolving a partnership, is, of course, *primâ facie* evidence of such a partnership having existed, but is not conclusive; for, Lord *Eldon*, in a case of this nature, directed an issue to try the fact of partnership. The allegation of the party who had subscribed the notice, but who denied the partnership, was, that the advertisement had been inserted for the purpose of counteracting a report that the parties were partners. *Ex parte Matthews*, 3 Ves. & Bea. 123. It may be observed, that a notice of dissolution in the Gazette may be given in evidence without a stamp. *Jenkins* v. *Blizard*, 1 Stark. 418; but see *May* v. *Smith*, 1 Esp. 283.

Notice of dissolution not requisite as to a dormant partner.

The necessity of notice of a partnership having been dissolved, does not exist on the secession of a partner whose connection with the concern has never been known to the public; but, even in this case, it is usual and more safe to insert an advertisement in the Gazette, for the fact of the existence of the partnership may have been inadvertently divulged, though it was not notorious; and proof of its being partially known among third persons would, it should seem, be sufficient to charge the seceding partner, without bringing the knowledge of it home to the plaintiff. *Evans* v. *Drummond*, 4 Esp. 89.

Nor in case of dissolution by death.

Where a partnership is dissolved by death, no notice is requisite in order to prevent the representatives of the deceased partner from being liable to the engagements of the surviving partners. If, however, a surviving partner is executor of the deceased partner, and deals with the customers of the firm in the latter character, the case would, it seems, *be different, for, as executor, he has a right to bind the testator's estate. See *Devaynes* v. *Noble*, 1 Mer. 616; *Vulliamy* v. *Noble*, 3 Mer. 614. The estate of a deceased partner is, of course, liable for all the engagements of the house existing at the time of his decease; and this liability is not discharged by a continued course of dealing on the part of the creditor with the surviving partners, indicating a reliance upon their responsibility; and, therefore, if the customer of a bank, to whom a balance was due at the decease of a partner, continues to keep an account with the house, drawing cheques, depositing cash, &c., the deceased partner's estate is not thereby discharged from so much of the balance as, in the course of such transactions, remained unliquidated; though, by the general rule, the payments subsequently made by the house would go in reduction of that balance. *Gough* v. *Davies*, 4 Pri. 200; *Devaynes* v. *Noble*, 1 Mer. 568, 586; *David* v. *Ellis*, 1 Car. & Pay. 368. See a full statement of these cases in *Collyer* on Partnership, 343.

[*30]

As to responsibility of the representatives of a deceased partner.

III. AS TO DEEDS OF PARTNERSHIP.

Deeds of partnership.

In preparing partnership-deeds care should be taken to mark with precision and clearness the nature of the business; the period at which the

partnership is to commence; the term of its duration; the proportions in which the parties are to share the profits and losses, and advance the capital; the mode in which the accounts are to be kept, and the business in general carried on; the degree of attention to be paid by the respective partners; the grounds, if any, on which any one or more of the parties shall be empowered to expel or exclude the other or others from the concern; whether, on the decease of either of the partners, his personal representatives are to have the option of succeeding to his share; in what manner, on the dissolution of the partnership by effluxion of time, death, expulsion, or otherwise, the partnership accounts are to be adjusted, and the affairs wound up; and lastly, whether any and what stipulation is to be made for referring disputes to arbitration.

As to the commencement of the partnership.

Where no time is mentioned for the commencement of a partnership, it will begin from the date of the articles; and parol evidence cannot be received to shew that it was intended to commence at a future period; which rule was adhered to in a late case, even where the partnership, if immediate, was illegal, the busineas being that of an attorney, and the partners two persons, one of whom at the time of the execution of the articles, had not been admitted. *Williams* v. *Jones*, 5 Barn. & Cress. 108.

Rule where agreement is silent as to shares.

Where an agreement, constituting a partnership, is silent as to the relative shares of the respective parties, the rule is to consider them as entitled to the profits equally. See *Peacock* v. *Peacock*, 16 Ves. 56.

Where stipulations are not acted upon.

It often happens that some of the stipulations in partnership-deeds are not acted upon by the parties. Where this is the case, a Court of equity will read the instrument as if those stipulations were expunged; particu-

[*31] *larly if, by the extension of the business to a species of trading not originally contemplated, they are become inapplicable. Thus, if the deed prescribes a particular mode of taking the accounts at the dissolution, and the partners have entered into a new branch of the trade, in which the accounts could not be so taken without manifest injustice, the Court will direct the accounts to be taken as if there was no such stipulation. *Jackson* v. *Sedgwick*, 1 Swanst. 470; and see *Geddes* v. *Wallace*, 2 Bligh, 295. And if the conduct of the parties differs from the articles, even in particulars expressly provided for therein, the Court will infer from the deviation an intention to vary the terms of the written agreement. As, where the parties agree, that no partner shall accept a bill in his own name, without the concurrence of all the others, yet, if they afterwards slide into the habit of permitting one of them to draw or accept bills without the concurrence of the others, the agreement will be considered as varied accordingly. *Const* v. *Harris*, Turn. & Russ. 523.

It is generally advisable, in laying down rules for the conduct of the partnership business, not to enter into the minute details, but leave them to be regulated as convenience shall dictate.

Many of the clauses usually inserted do no more than express the obli-

gations legally incident to the partnership relation; but they are not on this account wholly useless, as they draw the attention of the parties to the duties which they contract in becoming partners, and therefore are calculated to prevent misunderstanding. The advantage of having a written instrument to resort to, in order to ascertain the intentions of the parties, is obvious; and some recent cases signally illustrate the danger and folly of persons entering into partnership under merely oral agreements; though such, it is strange to say, is the situation of not a few considerable mercantile establishments. The fact seems to be, that so large a degree of confidence is requisite in forming the partnership connection, even with all the security that is to be derived from the most carefully framed provisions, that it requires no great extension of that confidence to forego entirely this species of protection. But though this may account for, it does not justify the neglect; for the necessary largeness of a risk surely affords no reasonable ground for unnecessarily extending it.

Inconveniences attendant on oral partnership agreements.

On the dissolution of a partnership, there are two ordinary modes of winding up the affairs of the concern; One is by a general conversion of the partnership assets, and dividing the produce, after providing for debts, among the partners, in proportion to their respective interests. The other is, for one partner to purchase the share of the other, usually at a valuation. The former is the mode in which the property is dealt with by a Court of equity in the absence of express stipulation, and indeed in every case is necessarily the rule where there is no positive agreement; without which, of course, neither partner can claim to take the share of the other at a valuation, their rights being equal. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298. And if it is provided generally, that the debts shall be paid, and the stock and effects divided, a trust for sale and conversion will be considered as implied, being necessary in order to raise a fund for paying the debts, as well as more beneficial and convenient in regard to the parties themselves, than a division of the articles in specie. *Rigden* v. *Pierce*, 6 Madd. 353.

Arrangements usually consequent on dissolution.

The latter mode of arrangement is generally stipulated for in articles in the event of the dissolution of the partnership by the death, expulsion, or voluntary retirement of either of the partners, especially where the property consists of an interest in land, stock, or machinery, which is essential to the carrying on of the trade. The same arrangement is sometimes extended to bankruptcy; but there is strong reason to contend that the pro-
*vision in such case is void, as contravening the policy of the bankrupt [*32]
laws, being an attempt to dispose of the bankrupt's property in an event in which those laws have taken the power of disposition from him. See *Wilson* v. *Greenwood*, 1 Swanst. 481. In this case the clause in question was contained, not in the original articles, but in a subsequent deed, which was executed in order to extend to bankruptcy a provision in the articles

Provision for purchase of partner's share on bankruptcy, void, *semble*.

applicable to death alone, and evidently made in contemplation of that event; on which ground Lord *Eldon* held it to be clearly void, without deciding the general question as to the validity of such a provision in the articles themselves.

Mode of securing purchase-money of share.

Where a deceased or retiring partner's share is to be purchased at a valuation, the purchase-money is generally to be secured by the bond or covenant of the continuing partner or partners, either with or without a surety, and is commonly payable by instalments; or otherwise is to be secured by a charge upon the share itself. The approval of the person offered as surety is often a source of dispute; and therefore the nomination, in case the parties cannot agree, should be left to some third person. Any attempt to secure the purchase-money on the share itself is generally inefficacious in the event in which the security is most wanted, namely, that of the purchasing partner becoming bankrupt, because the possession being delivered to him, the share is considered as in his "order and disposition," and within the intent of the well-known statutory provision, which vests such property in assignees. (See this doctrine fully discussed, *ante*, Vol. 5, p. 200).

Clauses for transmitting shares to widows, &c.

Sometimes partnerships are formed for a period greatly exceeding the probable duration of the lives of any of the parties, the partnership-deed containing provisions for transmitting their shares to their respective widows or children at their decease.

A clause of this nature occurred in the case of *Balmain* v. *Shore*, 9 Ves. 500, where A., B., and C. entered into partnership as potters for ninety-nine years; and it was covenanted, that, in case of the decease of any of the parties, no benefit of survivorship should be taken by the others, but the shares should belong to the widows during their respective lives, as a provision for their support, and to enable them to educate the children (if any); and after the decease of the widows, the shares should belong to, and be equally divided among, their respective children, if more than one, share and share alike; and where there might happen to be no such child or children, then the share of such widow should go to her executors, administrators, or assigns, except as to the share of A., which, at the decease of his widow, should go to his youngest son E., if then living. One of the questions was, whether a child of B., who died in his lifetime and that of his widow, was entitled to a share. Sir *Wm. Grant*, M. R., held, that though, according to the rules of construction applicable to dispositions of property in general, children [*33] *would take vested interests at their births; yet that in this case, considering the nature of the instrument, and that the object evidently was, that the shares should be enjoyed in succession, and not by anticipation, it was to be construed as applicable to children only who should be living at the death of the widow. And his Honour thought that a clause, which authorized the partners to sell their shares, giving a right of pre-emption to

the others, shewed that the children were not to take a vested interest in their shares in the lifetime of their parents.

No allowance to surviving partner for management.

It is obvious, that where the business is to be carried on by surviving partners for the benefit of the family or representatives of a deceased partner, it should be stated what degree of interference and control is to be exercised by the latter, and whether any allowance is to be made to the acting partners for their trouble in managing the concern. In the absence of agreement, they can claim no such allowance; *Burden* v. *Burden*, 1 Ves. & Bea. 172; though, as we have seen, the rule is otherwise, where the surviving partner carries on the trade on the joint account, without any obligation so to do under the partnership deed, *vide ante*, p. 27.

Clauses admitting the representatives of a deceased partner not in general compulsory.

Clauses providing for the admission into the firm of a deceased partner's representatives, will in general be construed as giving to them an option to become partners, and not as constituting them partners absolutely; for, to produce the latter effect (assuming that such effect *can* be produced), the intention should be unequivocally expressed. Thus, where, in a deed of partnership, the term of which was to be nineteen years, it was provided, that, if either of the partners should die during the term, "the widow or other legal personal representative of the partner so dying should be let into the said partnership concern, and be and become a partner therein, in the same manner, and upon the same stipulations," &c. "as the partner so dying stood at the time of his decease;" but so that any future husband of any such widow should not interfere in the management of the concern. It was contended that this clause, though giving an option to the widow, was absolute, if she declined, as to the personal representatives. *Alexander*, C. B., however, was of opinion that it was a covenant only to permit them to become partners if they thought proper, and that they were entitled to a reasonable time (*a*) for declaring their election after their testator's decease; for which purpose an opportunity should be given them of inspecting the partnership accounts. But his Lordship was of opinion that the representatives could not claim to suspend their election until the accounts of the partnership had been taken in the Master's office. *Pigott* v. *Bagley*, 1 M'Clel. & You. 569. If the representatives are to be admitted on certain terms, and they do not comply with such terms, they never become partners, and the dissolution takes place absolutely from the death of the deceased partner. *Kershaw* v. *Matthews*, 2 Russ. 62.

[34]

Arbitration clause.

A stipulation, that disputes arising between the partners shall be referred to arbitrators, to be named by the respective partners, is almost invariably inserted in deeds of partnership, and is popularly supposed to be more efficacious in preventing the possibility of litigation than it ac-

(*a*) In this case three months were considered to be a reasonable time.

tually is; for it is clear, that the specific performance of such a covenant cannot be enforced in equity, nor can damages for a breach of it be recovered at law; nor can it be pleaded in bar either to an action at law or suit in equity, whether the clause be general, or expressly applied to the particular question in dispute. (*Vide* cases *cit. ante*, Vol. 2, p. 627).

Such clauses, however, are not without use: they have a pacific tendency, in consequence of the impression which prevails as to their obligatory nature; and Courts of equity, though they cannot refuse to entertain a suit on account of the existence of an agreement to refer to arbitration, are disposed to encourage a resort to this conventional tribunal for the adjustment of matters which cannot be adequately investigated or dealt with by the Court, and to view with disfavour the conduct of a party who insists upon seeking its aid without having first attempted to obtain redress by this means.

Thus, in *Waters* v. *Taylor*, 15 Ves. 10, Lord *Eldon* refused to appoint a manager and receiver of the Italian Opera House (an establishment which has made a conspicuous figure in the annals of partnership litigation), upon an interlocutory motion, on the ground that there were special provisions for referring to arbitration these particular subjects of dispute, and they being such as to render it almost impossible that justice could be administered by the Court: his Lordship observed—"With reference to the case of *Halfhide* v. *Fenning*, 2 B. C. C. 336, I admit, that, upon the best authority, the opinion expressed by Lord *Kenyon* in that case is wrong, as there are against it the concurrent opinions of Lord *Hardwicke*, Lord *Thurlow*, Lord *Rosslyn*, and of Lord *Kenyon* himself. As a general proposition, therefore, it is true that an agreement to refer disputes to arbitration will not bind the parties even to submit to arbitration before they come into Court. I would not, therefore, say that the consequence of this provision in the instrument is, that a suit cannot be instituted, without adding this qualification: that the Court, if bound to administer relief, is fully justified in pausing before it takes, upon an interlocutory motion, a step, that is, in truth, the greatest part of the relief; and if the Court will not come to such a decision in the cases to which I have alluded, where no individual has any particular right, founded in contract, which is to be divested, it is much more wholesome, where the parties have contracted for this mode of settling their differences, and the point of dispute is one which is expressly provided for, to let them try whether they cannot so settle it, than that this Court should interpose upon this sort of summary application."

For further observations on the several provisions inserted in partner-
[*35] *ship deeds, the reader is referred to the notes accompanying the precedents in which they occur; and for the law of partnership, generally, to the Treatises of Mr. *Gow*, Mr. *Montagu*, and Mr. *Cary*, to which must

now be added the recent and very useful work of Mr. *Collyer*. As the editor has, in several instances, ventured to express his dissent from the conclusions of the first of these writers, he has the more pleasure in bearing his testimony to the general correctness and perspicuity which eminently characterize the work.

ARTICLES *of* PARTNERSHIP *between two* TRADERS, *with* ORDINARY CLAUSES. (*A Short Form.*)

BETWEEN TWO TRADERS.

ARTICLES OF AGREEMENT, made the —— day of ——, in the year of our Lord ——; BETWEEN [A.], of &c., of the one part; and [B.], of &c., of the other part. Parties.

WHEREAS the said [A.] and [B.] are desirous of becoming partners in their said trade or business of a ——, for the term, and subject to the stipulations hereinafter expressed: NOW THEREFORE THESE PRESENTS WITNESS, that each of them the said [A.] and [B.], for himself, his heirs, executors, and administrators, hereby covenants with the other of them, his executors and administrators, in manner following, (namely):— Recital of agreement to become partners. *Testatum.* Each covenants with the other.

THAT the said [A.] and [B.] shall henceforth be and continue partners together, in the trade or business of ——, for the full term of seven years, to be computed from the day of the date of these presents, if the said partners shall so *long live, subject to the provisions hereinafter contained for determining the said partnership. Duration of partnership. [* 36]

THAT the said business shall be carried on under the firm of [A.] and [B.], in the messuage belonging to the said [A.], in —— Street aforesaid, or in such other place of business as the said partners shall from time to time mutually agree upon. Stile of firm, and place of business.

THAT the said partners shall be entitled to the profits of the said business in the proportions following, (namely), the said [A.] to two third parts, and the said [B.] to the re- Respective proportions of profits.

BETWEEN TWO TRADERS.

maining one third part thereof: And that all losses happening in the course of the said business shall be borne by them in the same proportions, (unless the same shall be occasioned by the wilful neglect or default of either of the said partners; in which case the same shall be made good by the partner through whose neglect the same shall arise).

Sums to be drawn out monthly.

THAT the said [A.] shall be at liberty, from time to time, to draw out of the said business any sum or sums not exceeding the sum of £—— *per* month, for his own use: And the said [B.] shall also be at liberty to draw out of the said business any sum or sums not exceeding the sum of £—— *per* month, for his own use; such sums to be duly accounted for by them respectively, on every settlement of accounts and division of the profits of the said business.

Proportions in which capital is to be advanced.

THAT the capital requisite for carrying on the said business shall be advanced or brought into the said business by the said [A.] and [B.], in the following proportions, namely, two thirds by the said [A.], and the remaining one third part thereof by the said [B]: And that they shall be considered as creditors of the said partnership in respect of such capital, and shall be allowed interest for the same, after the rate of *5l. per centum per annum* (*a*).

Variation where a definite sum is advanced.

(*a*) Usually, a definite sum is advanced by the partners at the time of entering into partnership. It also frequently happens, that the stock in trade, &c., requisite for carrying on the trade, is purchased of one of the partners. In such case, for the clause in the text, substitute the following:

"That the sum of £——, this day advanced by the said partners, in the proportions aforesaid, shall be deemed to be the capital of the said partnership; out of which sum of £—— the sum of £—— shall be forthwith paid to [A.], as and for the price or purchase-money of the stock in trade and fixtures heretofore used by him in his said trade or business of a ——, carried on in the said messuage, in —— Street aforesaid, and which stock in trade and fixtures have been purchased by the said partnership at the price aforesaid; and the said partners shall be entitled to and interested in the said capital, stock in trade, and fixtures, in the proportions aforesaid."

Sometimes the capital is to be advanced within a definite time, thus:—

Capital to be ad-

"THAT the capital of the said partnership shall consist of

BETWEEN TWO TRADERS.

THAT the said [A.] shall be allowed by the said partnership the clear yearly sum of £——, by way of rent for the said messuage in —— Street aforesaid, so long as the said business shall be carried on therein; but that the said messuage shall continue the sole property of the said [A.], subject only to be used for the purposes of the said partnership business (*b*). Payment to one partner for rent.

[38]

THAT as well the said rent as all taxes and other outgoings which shall become payable in respect of the messuage wherein the said business shall be carried on, the costs of insuring the stock in trade and fixtures belonging to the said partnership from loss or damage by fire (*c*), the expense of Expenses of partnership to be paid out of the profits.

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the sum of £——, which shall be brought in by the said partners in the following proportions, namely, the sum of £——, being two thirds thereof, by the said [A.], and the sum of £——, being the remaining one third, by the said [B.]; and the said sums so to be advanced by the said partners respectively shall be paid by them into the bank of Messrs. ——, at —— aforesaid, to the credit of the said partnership, on or before the —— day of ——." vanced within a definite time.

(*b*) Add, if so intended,

"THAT the said [A.] (*or* [B.] *as the case may be,*) shall be at liberty, if he shall think proper, to use and occupy all such part of the said messuage as is not used in, or wanted for the purposes of, the said partnership business, for the residence of himself and his family, without paying any rent or taxes for the same." That one of the partners may occupy part of the house in which the business is carried on.

Or, if so intended,

"at the yearly rent or sum of £——, to be paid or allowed by him to the said partnership, in equal half-yearly portions, or proportionally for any less period, during the time of such occupation; but the said [A.] (*or* [B.]) shall not be required to pay any proportion of the taxes in respect of his said occupation, and shall be at liberty to quit and leave the said premises, if he shall think proper, without any previous notice."

(*c*) If the house is to be kept in repair at the expense of the partnership, add—

"And of keeping the said messuage and premises of [A.], Repairs of house.

BEWTEEN TWO TRADERS.

providing coals and candles, and of paying clerks, porters, and servants to be employed in the said business, and of travelling, and all other disbursements and expenses which may be incurred by the said partners respectively in the course of the said business, shall be paid and borne out of the profits of the said business.

No apprentice, &c. to be taken by one partner without the consent of the other.

THAT no apprentice, clerk, or servant, shall be taken or engaged, or be employed in or about the said business, by either of the said partners, without the consent of the other of them.

Apprentice-fees to be divided as profits.

THAT all premiums and apprentice-fees, to be paid with any apprentice or other person to be received into the said business, shall be considered as part of the profits of the said business, and be divided accordingly.

Accounts to be annually taken.

THAT, as soon as conveniently may be after the —— day of ——, in every year during the said partnership, the said partners shall make a full and correct account in writing of all the credits and effects due, owing, and belonging to the said partnership, and all debts and demands due or owing by or from the said partnership, according to the usual mode of making out such accounts among ——, and cause such account to be written in two books, to be respectively subscribed by the said partners; and after such subscription each of the said partners shall take [*39] *one of the said books, and be concluded thereby, unless some manifest error shall appear therein within the space of twelve calendar months next after the making up of such accounts, and be notified by either of the said partners unto the other of them within that time; and in such case only such error shall be rectified: And that, on the making up of every such yearly account, all interest which shall become due to the said [A.] or [B.] for such sum or sums of money as they shall respectively advance and bring into the said partnership, and the yearly allowance of £—— to the said [A.] for rent, shall, in the first place, be deducted, and the residue of the clear profits of the said business, which shall have accrued or been gained in the preceding year, shall be divided amongst the said partners in the proportions aforesaid.

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so long as they shall be used in the said partnership business, in good and substantial repair."

BETWEEN TWO TRADERS.

That the said partners respectively shall keep, or cause to be kept, proper accounts in writing of all monies received and paid; of all contracts entered into, and all business transacted on account of the said partnership, and all other matters of which accounts ought to be kept, according to the usual and regular course of the said business, and which accounts, together with all deeds, securities for money, and papers belonging to the said partnership, shall be kept at the —— where the said business shall be carried on, and not elsewhere; and shall, at all reasonable times, be open to the inspection of both the said partners.

To keep proper accounts, &c. which are to be open to the inspection of both partners.

That the said partners shall be true and just to each other in all their contracts, sales, reckonings, receipts, payments, and dealings; And shall, at all times during the continuance of the said partnership, diligently and faithfully employ themselves respectively in the conduct and management of the said business, and the concerns of the said partnership.

To be faithful to each other, &c.

That neither of the said partners shall transact any business, or enter into any contract or agreement with, or give credit to, any person or persons, or lend or advance any sum or sums of money out of the said partnership funds, to any person or persons, after he shall be requested by the other of the said partners not to do the same: And that neither of the said partners, without the consent *of the other of them, shall compound, release, or discharge, any debt or duty which shall be due or owing to the said partnership, without receiving the full amount thereof; nor sign any bankrupt's certificate, letter of license, or other instrument, whereby any debt or security shall be in anywise discharged, vacated, or diminished: And also, that neither of the said partners, without the consent of the other of them, shall draw or accept any bill of exchange or promissory note, or contract any debt on account of the said partnership, except in the usual and regular course of the business of the said partnership, and for the benefit thereof: That neither of the said partners shall become bail or surety for any person or persons (*d*), [or draw, in-

Neither partner to give credit, &c. after notice from the other not to do so.

Nor, without consent of the other, compound debts, &c.

[*40]

Nor draw, &c. any bill, except in the regular course of business.

(*d*) This prohibition is often found useful in affording partners a reason for refusing to become bail or surety.

BETWEEN TWO TRADERS.

dorse, or accept any accommodation bill or note, or underwrite any policy of insurance, or make or enter into any time-bargain for the sale or purchase of stock in any Government security, or expose himself to any other risk or hazard in any gaming transaction (*e*)]: And that neither of the said partners shall assign over his share or interest in the said partnership, or withdraw his share of the capital therein, or carry on, either separately or in partnership with any other person or persons, the business of ——, or knowingly or willingly do, commit, or permit, any act, matter, or thing whatsoever, by which or by means of which the said partnership monies or effects shall be seized, attached, extended, or taken in execution.

Power of expulsion on certain acts and defaults.

PROVIDED ALWAYS, that, if (contrary to the several agreements hereinbefore contained,) either of the said partners shall neglect or refuse to attend to the business of the said partnership, or if either of the said partners shall wil-

[*41] *fully neglect or refuse to keep proper and just accounts; or shall transact business or enter into contracts with, or make advances or give credit to, any person or persons after he shall be requested not to do the same; or if (contrary to the said agreements) either of the said partners shall compound or release any debt, or sign any bankrupt's certificate, letter of license, or such other instrument as aforesaid; or draw or accept any bill or note, or contract any debt on account of the said partnership, except in the usual and regular course of the business of the said partnership, and for the benefit thereof; or shall become bail or surety for any person or persons; [or shall draw, indorse, or accept, any accommodation bill or note, or underwrite any policy of insurance, or shall make or enter into any time-bargain for the sale or purchase of stock in any Government security, or expose himself to any other risk or hazard in any gaming transaction]; or shall assign his share or interest in the said

(*e*) The clause within brackets is less frequently used than the stipulation not to become bail or surety. The principle of the objection, however, applicable to all such transactions, is the same; being, not that the offending partner directly brings any responsibility upon the firm by the acts in question, but that he exposes himself to ruin by his imprudence, which would lead to a dissolution of the partnership, or be otherwise detrimental to its interests.

BETWEEN TWO TRADERS.

partnership, or withdraw his share of the capital therein; or if either of them the said [A.] and [B.] shall carry on, either separately or in partnership with any other person or persons, the trade or business of a ——; or shall become insolvent, or shall suffer his body to remain in execution for more than one calendar month; or shall do, commit, or permit to be done, any act, matter, or thing whatsoever, by which, or by means of which, the said partnership monies or effects may be seized, attached, extended, or taken in execution: Then, and in any of the said cases, the other of the said partners, if he shall think fit, shall be at liberty to dissolve the said partnership, by giving to the partner who shall offend in any of the particulars aforesaid, or leaving in the ——, or other place where he shall usually carry on business, a notice in writing, declaring the said partnership to be dissolved and determined: And the said partnership shall, from the time of giving or leaving such notice, or from any other time to be therein specified for the purpose, absolutely cease and determine accordingly; without prejudice, nevertheless, to the remedies of the respective partners for the breach or non-performance of all or any of the covenants and conditions contained in these presents, at any time or times before the determination of the said partnership: *And the said partner, to whom the said notice shall be given, shall be considered as quitting the said business for the benefit of the partner who shall give the said notice: And both the said partners shall join in causing a proper notice of the dissolution of the said partnership to be inserted in the London Gazette.

[*42]

In case of the death of either partner, the survivor may purchase his share.

That, in case either of the said partners shall die before the expiration of the term of the said partnership, then the surviving partner shall, within the space of six calendar months next after the decease of the partner so dying, settle and adjust with the representative or representatives of the deceased partner, all accounts, matters, and things relating to the said partnership: And if the surviving partner shall be desirous of purchasing the share of the deceased partner (*f*), of and in the property, credits, and effects of the

(*f*) In preparing clauses for enabling some partners to become the

BETWEEN TWO TRADERS.

said partnership, then the value thereof shall be ascertained by two indifferent persons, one to be chosen by the surviving partner, and the other by the representative or representatives of the deceased partner; and the surviving partner shall thereupon become the purchaser of the said share at such valuation, and shall enter into a bond, in a sufficient penalty, for securing to the representative or representatives of the deceased partner the amount of such valuation, by three equal instalments, at the respective periods of six, twelve, and eighteen calendar months next after the decease of the partner who shall so die as aforesaid, with interest at the rate of *5l. per centum per annum*, from the time of such decease; And also a bond for indemnifying the estate and effects of the deceased partner against the debts and demands due or owing by or from the said partnership, on having a proper assignment or assurance executed for vesting in the surviving partner the share of the deceased partner, and enabling such surviving partner to collect and get in all the credits and effects due, owing, and belonging to the [*43] *said partnership (*g*). But in case, at the decease of either of the said partners as aforesaid, the surviving partner shall decline to purchase the share of the deceased partner in manner aforesaid, then the credits and effects of the said partnership shall be collected in or converted into money; and out of the money arising therefrom all the debts due from the said partnership shall be discharged, and the surplus or residue (if any) shall be divided between the said surviving partner and the representative or representatives of the deceased partner, in the proportions hereinbefore mentioned.

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purchasers of the shares of others, and, indeed, in every case where a party is empowered to do a particular act, it should be clearly shewn whether it is intended to be optional or compulsory. An attention to this particular would prevent much ground for dispute.

(*g*) An assignment or power of attorney is not requisite, in order to enable the surviving partner to receive the debts, since the partnership is considered as subsisting even after a dissolution, until the affairs are wound up (*vide ante*, p. 24). It is usual, however, to execute such an instrument, in which the assignor covenants not to interfere in the receipt or recovery of the assets.

BETWEEN TWO TRADERS.

Arrangement of affairs on the determination of the partnership by notice.

THAT, in case of the determination of the said partnership by either of the said partners, by notice as aforesaid, the partner giving the said notice shall have the like option of purchasing the share of the partner to whom the said notice shall be given, as is hereby given to the surviving partner upon the decease of either of the said partners, and upon the same terms in all respects; and if such partner shall decline to purchase the share upon the terms aforesaid, then the said partnership accounts and affairs shall be adjusted and wound up in the same manner as is hereinbefore provided in the event of the death of either of the said partners and the surviving partner declining to purchase the share of the deceased partner.

Option to one partner to purchase the messuage of the other, at a certain price.

THAT, in case the said [A.] shall die before the expiration of the term of the said partnership, then the said [B.] shall have the option of purchasing from his representative or representatives the messuage in —— aforesaid, where the said business is now carried on, at the price or sum of £——, provided that the said [B.] signify his intention of becoming the purchaser of the said messuage to the representative or representatives of the said [A.], within three calendar months next after the decease of the said [A.]: And the said [B.] shall accept an assignment *(to be prepared at his expense,) of the term of the said [A.] in the said leasehold premises, whereof —— years are now expired, subject to the yearly rent of £——, without requiring the production of the lessor's title.

[*44]

Arbitration clause.

THAT, if at any time during the said partnership, or at any time after the expiration or determination thereof, any dispute, doubt, or question shall arise between the said partners, or their respective heirs, executors, or administrators, either on the construction of these presents, or respecting the accounts, transactions, profits, or losses of the business of the said partnership, then every such dispute, doubt, or question, shall be referred to the arbitration of two indifferent persons, one to be named by each party in dispute; or in case either of the parties in dispute shall refuse to join in such nomination, then both of the said arbitrators to be named by the other of the said parties: And in case such referees cannot agree upon an award, then the said dispute, doubt, or question, shall stand referred to the umpirage or arbitration of such one

BETWEEN TWO TRADERS.

person as the said two referees shall, by any writing under their hands, appoint, so that every such reference shall be made within forty days next after such dispute, doubt, or question shall arise: And the award or determination which shall be made by the said two referees, or by their umpire, concerning the premises, shall be final and conclusive on the parties respectively, and their respective heirs, executors, and administrators, so as such referees shall make their award in writing under their hands, or appoint an umpire, within forty days next after the reference to them; And so as such umpire shall make his determination in writing, under his hand, within twenty days after the time appointed for making the award of the said referees shall be expired: And it is hereby further agreed, that this submission to reference shall be made a rule of his Majesty's Court of King's Bench at Westminster, on the application of either of the parties to the reference: And also, that no suit at law or in equity shall be commenced or prosecuted against the referees or their umpire, concerning any of the matters or things so to be referred to them or him as aforesaid, or concerning their or his award or determination: And that the several and respec-
[*45] *tive parties to such reference shall submit to be examined by the said referees, or their umpire, upon oath (*h*), to be administered in such manner as the said arbitrators or umpire shall direct, for the discovery of any of the dealings or transactions of the said partnership, relating to the matters to be referred as aforesaid: And it is hereby further agreed, that no suit at law or in equity shall be commenced or instituted by either of the said partners, his heirs, executors, or administrators, against the other of them, his heirs, executors, or administrators, touching the matters in dispute, before the partner, his heirs, executors, or administrators, to be made defendant or defendants to such suit or suits, shall have refused or neglected to refer the matter in difference to arbitration, pursuant to the agreement hereinbefore contained (*i*), or unless the time limited for making such award or determination shall have elapsed or expired, without any such award having been made. IN WITNESS, &c.

(*h*) As to this, *vide ante*, Vol. 2, p. 623.

(*i*) *Vide ante*, p. 34.

DEED *of* PARTNERSHIP *between* SOLICITORS, *with ordinary Clauses, including Provisions (rather special) relating to the* CUSTODY *of* DRAFTS, PAPERS, *&c.: Also an* AGREEMENT *to make an* ALLOWANCE *for* DEFICIENCY *in the* ACTUAL *below the* ESTIMATED *Amount of the Proportion of Business brought by each Partner* (*a*).

BETWEEN TWO SOLICITORS.

THIS INDENTURE, made the —— day of ——, BETWEEN [A. B.], of &c., attorney at law and solicitor, of the Parties.

(*a*) It is common for partnerships between solicitors and other professional men to be formed upon terms such as the following:—An established firm of large practice takes in a junior partner, on his paying, for the purchase of the share to be held by him, a sum calculated on the average profit of the business for an antecedent period, (frequently two years and a half purchase on the average profit of the last seven years); and if the incoming partner has been also in practice, the calculation usually is made on the excess of the profit of the purchased share over that of his own business during the same period, with a provision sometimes, as in the text, that either party shall make an allowance for any deficiency which shall be found to arise in the *actual* as compared with the *estimated* amount. A person paying a premium on his introduction to a business should keep in view the possible event of his death before the income of the business shall have yielded him an adequate return; for, in the absence of stipulation, the good-will belongs exclusively to the survivor, and the representatives of the deceased partner would not be entitled to any proportion of the profit made by him in the disposal of it. See Sir *J. Leach's* judgment in *Farr* v. *Pearce*, 3 Madd. 78*. In the event of the death of the in-

As to partnerships between solicitors.

[46]

* But where an attorney, who had received a large sum from a person, as a consideration for a partnership of five years, determined the partnership by his own act within thirteen months after its commencement, by suing out a commission of bankrupt against his partner, the Court of Exchequer was of opinion that a proportional part of the consideration money ought to be returned. *Hamil* v. *Stokes*, Daniel, Exch. 20; *S. C.*

Partner not in general entitled to a return of premium on account of the bankruptcy of the other.

BETWEEN TWO SOLICITORS.

Recital of agreement to become partners.

one part; and [C. D.], of &c., attorney at law and solicitor, of the other part. WHEREAS the said [A. B.] and [C. D.]

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coming partner, who has paid a premium, shortly after the formation of the partnership, it seems fair that the surviving partner should return part of the premium, or give to the representatives of the deceased partner an interest in the profits for a certain period, if the business be carried on, or in the money produced by the sale of the good-will, if it be disposed of.

Sale of the good-will of an attorney's business valid.

The validity of the sale of the good-will of an attorney's business was questioned and established in the case of *Bunn* v. *Guy*, 4 East, 190, which was a case sent from Chancery for the opinion of B. R., and of which the circumstances were as follow: A., an attorney, by articles of agreement under seal, covenanted with C. and D. to relinquish to them the benefit of his business as an attorney, so far as respected his practice within London and 150 miles from thence, and all his business as an agent; that he would not practise as an attorney, &c., within those limits; and that he would endeavour by every means in his power to induce his clients to become the clients of B. and C., and would introduce them by personal application and otherwise, and would also permit them to practise under the firm of A., B., and C. for one year, and afterwards for one year more, if B. and C. should so long require to use his name in the firm; that he (A.) would not claim any share in the profits of the business, being indemnified from all losses, and that B. and C. should carry on the business in the same manner as if A.'s name were not used. In consideration of this, B. and C. covenanted to pay A. 1,000*l.* and secure him 1,000*l.* more at a future day, and an annuity of 600*l.* for seven years, and to indemnify him from all losses; and that, in default of payment of the annuity, it should be lawful for A. to resume the business. The question was, whether this contract was good in law, so that A. could recover the money stipulated to be paid, in an action against B. and C. It was contended, 1st, That the deed was without consideration, the good-will of an attorney's business being personal, depending upon his integrity and skill in his profession, and therefore incapable of transfer; 2dly, That the permission by A. to B. and C. to use his name was contrary to the policy of the law, being incon-

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4 Price, 161. In the ordinary case, however, of the determination of a partnership by the bankruptcy of a partner who has received a premium for the good-will, the solvent partner has no claim to any allowance on such account, as this is a risk necessarily incidental to the connection, every partnership being liable to determine by bankruptcy; and if any instalment of the stipulated price remains unpaid, the partner has no equity to prevent the assignees from pursuing their legal remedies for its recovery. *Akhurst* v. *Jackson*, 1 Wils. C. C. 151.

have mutually agreed to enter into partnership in the profession or practice of attornies at law, solicitors, and convey- BETWEEN TWO SOLICITORS.

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sistent with his duty as an officer of the Court, which was a personal trust; 3rdly, That the agreement to recommend B. and C. was contrary to morality, being absolute, and not provided they continued worthy of the recommendation. The Court, however, over-ruled all these objections, and certified in favour of the validity of the deed.

The certificate thus sent was acted upon by Lord *Eldon*, though it seems not to have had his Lordship's cordial acquiescence; for, on a late occasion, alluding to this case, he said, "I doubted whether professional men would be recommended, not for skill and knowledge in their profession, but for a sum of money paid and advanced. I knew that this would rip up many transactions, and I was happy that the Court of King's Bench was of a different opinion, though *I never could entirely reconcile myself to their doctrine.*" See his Lordship's judgment in *Candler* v. *Candler*, Jacob, 231. Lord *Ellenborough's* answer to the objection suggested by Lord *Eldon* was, that the agreement to recommend must be considered as founded on the assumption that the parties continue worthy of recommendation.

A doubt has also been entertained whether a solicitor can make an allowance to the representatives, or widow, or children, of a deceased partner out of the profits of his business, consistently with the stat. 22 Geo. 2, c. 46, s. 11, which recites that "divers persons, who are not examined, sworn, or admitted to act as attornies or solicitors in any Court of law or equity, do, in conjunction with or by the assistance or connivance of certain sworn attornies and solicitors, and by various subtle contrivances, intrude themselves into, and act and practise in the office and business of attornies and solicitors, to the great prejudice and loss of many of his Majesty's subjects, and the scandal of the profession of the law;" and enacts that "if any sworn attorney or solicitor shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, *or permit or suffer his name to be any ways made use of, upon the account or for the profit of any unqualified person or persons*, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the Court from whence any such process did issue, and proof made thereof upon oath, to the satisfaction of the Court, that such sworn attorney or solicitor hath offended therein as aforesaid, then, and in such case, every such attorney or solicitor so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor: and in that case, and upon such complaint and proof made as

Allowance to the widow, &c. of a deceased partner not illegal within the stat. 22 Geo. 2, c. 46.

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ancers, in the city of London, for the term of ——, and under the stipulations and conditions hereinafter contained.

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aforesaid, it shall and may be lawful to and for the said Court to commit such unqualified person so acting or practising as aforesaid to the prison of the said Court for any time not exceeding one year."

The point in question underwent some discussion in the late case of *Candler* v. *Candler*, Jacob, 225, the circumstances of which were as follow:—In October, 1815, C., who had carried on the business of an attorney, or solicitor, and conveyancer, at T——, died, leaving ten children and a widow. By a deed executed shortly after his death, dated the 25th of October, 1815, between H. C., his eldest son, and M. C., the widow, it was recited, that, from the love and affection which he (H. C.) bore towards his mother and family, and in compliance with the wish and hope expressed by his father, and also under a due sense of the influence which his mother and family would retain with his father's clients and connections, he had agreed with the said M. C. to carry on the business of an attorney, or solicitor, and conveyancer, at E——, and to account with her for a moiety of the clear net profits; in consideration of which she was to supply him with money sufficient to carry on the business. He then covenanted to carry on the business so long as any of the other children should be living unmarried, and under twenty-one, and, within two months after the taking of every yearly account, to pay to M. C., her executors,
[49] administrators, or assigns, a moiety of the clear profits; and also to permit her to have free access to the books of account, to devote the whole of his time to the business, to make out accounts annually, &c. She covenanted to provide him with such sums as should be wanted by him, in order to carry on the business, and also to use her influence to induce her friends and connections to employ him. The present bill was filed by the younger children of M. C., who was dead, against H. C., for an account of a moiety of the profits. On a motion for an injunction, the question was discussed, whether this agreement was not void under the stat. 22 Geo. 2.

Lord *Eldon*.—"If we are to construe the enacting part by the recital, there is no doubt that this lady did not intrude herself into, or act and practise in the office of an attorney or solicitor; but the point contended for, I suppose, would be, that her taking the profits would be evidence that she had done so. The meaning of the clause undoubtedly is this, (whether the terms used have gone further is another question), that qualified persons should not permit their names to be used by others, so as to enable them to appear as attornies: and the question therefore is, whether the words "permit or suffer his name to be any ways made use of upon the account, or for the profit of," &c. are not to be construed in connection with the other words, "thereby to enable him or them to appear,

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Of the average amount of their respective businesses.

AND WHEREAS the said [A. B.] and [C. D.] have respectively been for some years in practice; and the practice of the said

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act, or practise," &c., so as to prevent it from going beyond the mischief that it was intended to provide for. I should state that this statute, if the construction be such as is contended for, has been violated over and over again, and by the best men in the profession. It has happened to me to know, that it is no uncommon thing for gentlemen leaving the profession to stipulate for an annuity, payable out of the future profits." His Lordship proceeded to observe, that the clause introduced in the late notary act, 41 Geo. 3, c. 76, providing that the prohibition to notaries from acting for the benefit of unqualified persons, should not extend to allowances made to the widows or children of deceased notaries by surviving partners, might be considered to afford an argument against his construction, as shewing that it was the notion of the Legislature, that, without this exception, the notary could not have made such a provision. But his Lordship was of opinion that the exception in the act in question was unnecessary. The principal case was disposed of upon other grounds, so that the point was not decided. There can be no doubt, however, that a Court of law, adopting Lord *Eldon's* construction of the statute of 22 Geo. 3, would hold an allowance by a solicitor out of the profits of his business to the representatives, or widow or children, of a deceased partner, to be valid.

Partnership with an unqualified person contrary to the statute.

But it is clear that an agreement made by an attorney with an unqualified person, admitting him to a participation of the labours and profits of his business, is a partnership, and exposes them both to the statutory penalties. *In re Jackson*, 1 Barn. & Cress. 270; *In re Clark*, 3 Dowl. & Ryl. 260; *Hopkinson* v. *Smith*, 7 J. B. Moore, 242. And a declaration introduced into the agreement, that the person shall not be a partner, of course does not prevent its having this operation. *Tench* v. *Roberts*, cit. Jacob, 227.

Such agreements are sometimes made with clerks, who, it is stipulated, shall receive a certain share of profit, instead of a salary, in order to stimulate their diligence; but the expedient is attended with the utmost danger, for the Courts rigorously enforce the severe penalties of the statute, when a case of infringement of its provisions is brought before them. The contract, too, according to the well-known principle of law governing illegal contracts, creates no obligation on either party. One cannot compel the other to account for the profits of the partnership, or to contribute towards advances made, or losses and expenses incurred, in carrying it on. *Lightfoot* v. *Tenant*, 1 Bos. & Pull. 551; *Aubert* v. *Maze*, 1 Bos. & Pull. 371; *Mitchell* v. *Cockburn*, 2 H. Bl. 379; *Booth* v. *Hodgson*, 6 D. & E. 405; *Langton* v. *Hughes*, 1 M. & S. 595; *Ex parte Bell*, Id. 754; *Ex parte Daniels*, 14 Ves. 191. And the application of this principle is

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[A. B.] is on an average of the last three years estimated to produce the net profit or yearly sum of £——, at the least; and the practice of the said [C. D.], on a similar average, is estimated to produce the net profit or yearly sum of £——, at the least. AND WHEREAS it is intended, as hereinafter stipulated, that the said [A. B.] shall be entitled to three fourth parts of the net gains and profits to arise from the partnership business or practice intended to be hereby established; and that the said [C. D.] shall be entitled to the remaining one fourth part of such net gains and profits; wherefore, on the assumption that the net profits of the said partnership business will amount in every year to the full sum of £——, (being the aggregate amount of the estimated profits of the respective businesses of the said [A. B.] and [C. D.]), the three fourth parts of the said [A. B.] of the said profits will amount to the sum of £——, at the least, and the one fourth part of the said [C. D.] thereof will amount to the sum of £——, at the least; [*51] and such the share of the said [C. D.] of the *profits of the intended partnership business will exceed the estimated profits of his present practice by the sum of £——: And, therefore, it has been agreed that the said [C. D.] shall pay to the said [A. B.] the sum of £——, being the amount of three years' purchase of the said excess or sum of £——.

Testatum.

In consideration of a sum of money paid by one partner to the other.

NOW THIS INDENTURE WITNESSETH, that, in consideration of the mutual trust and confidence which the said parties respectively repose in each other, and also in consideration of the sum of £—— of lawful money of Great Britain and Ireland, paid by the said [C. D.] to the said [A. B.] at or immediately before the execution of these presents, the receipt whereof the said [A. B.] doth hereby acknowledge, and therefrom doth discharge the said [C. D.], his heirs, executors, and administrators, each of them the said [A. B.] and [C. D.] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the

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not excluded by the circumstance that the statute in the present instance imposes a penalty only, and does not expressly prohibit or declare void the proceeding against which its penalties are directed. *Bensley* v. *Bignold*, 5 Barn. & Ald. 335.

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other of them, his executors and administrators, in manner following, that is to say:—

Each covenants to become partner with the other.

THAT they the said [A. B.] and [C. D.] shall and will become, continue, and be partners in the profession or business of attornies at law, solicitors, and conveyancers for the term of —— years from the date hereof, if they the said [A. B.] and [C. D.] shall so long live.

Place and style of business.

THAT the said partnership business shall be carried on at the offices or chambers which have been taken by the said partners in —— Square, or at such other place as thesa id parties shall approve, under the name or style of Messrs. [A. B.] and [C. D.]

At the expiration of partnership neither party to occupy the offices of business.

THAT, on the dissolution of the said partnership by effluxion of time, the offices or chambers in which the said partnership business shall be then carried on, shall be let or disposed of, and neither of them the said partners shall, either directly or indirectly, practise or carry on business therein for the space of —— years from the time of such dissolution.

Capital.

THAT the capital of the said partnership shall consist of the sum of £——, and of such other sum and sums of money as shall from time to time be wanted for carrying on the said business with facility and advantage, and which shall be made up and advanced by the said [A. B.] *and [C. D.], in the same proportions as they shall respectively, for the time being, be entitled to the profits of the said partnership; and that the said sum of £—— shall be paid by them in the said proportions to the bankers of the said partnership, on account thereof, on or before the —— day of —— next.

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Bankers.

THAT Messrs. —— & Co., or such other house as the said parties shall jointly approve, shall be the bankers of the said partnership.

Interest on capital advanced.

THAT, if either of the said partners shall at any time or times advance or pay, to or for the use or benefit of the said partnership, any sum or sums of money beyond the proportion which he ought to pay or contribute, then the partner so advancing such sum or sums of money shall be paid and allowed interest thereon after the rate of *5l. per cent. per annum*, before any division of profits shall be made.

Cheques, &c. how to be drawn.

THAT all cheques, bills of exchange, and promissory notes, made, drawn, indorsed, and accepted by either of

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the said partners on the joint account of the said partnership, shall be made, drawn, indorsed, and accepted in the name of the said partnership firm.

Shares of partners.

THAT the said parties shall be respectively interested in and entitled to the capital, property, and profits of the said partnership business in the proportions following, (that is to say): three equal undivided fourth parts or shares shall belong to the said [A. B.], and the remaining one fourth part thereof shall belong to the said [C. D.]

Average of net gains to be ascertained at the end of the first three years.

THAT (*b*), at the end of the first three years of the said partnership, it shall be ascertained what on the average of such three years the net gains and profits of the business or practice, which shall have come through each of them the said [A. B.] and [C. D.], shall have amounted to in each such three years; in ascertaining which net gains and profits, no deduction shall be made on account of the salaries of clerks, rent of offices, and other general ex-

[*53] penses attending or incident to the management and *conduct of the said business, but only for the disbursements and expenses incurred in the particular matters of business included in such computation: And if it shall appear that the net gains and profits of the business or practice which shall have come through the said [A. B.] have not, on the average of the said first three years, amounted in each of such years to the sum of £——, and that the net gains and profits of the said business or practice which shall have come through the said [C. D.] have, on the average of the said first three years, amounted in each of such years to the sum of £——; Then the said [A. B.], his heirs, executors, or administrators, shall and will, on demand, pay to the said [C. D.], his executors or administrators, three fourth parts of the difference between the aggregate amount of the net gains and profits, for the first three years, of the business or practice which shall have come through the said [A. B.], and the sum of £——, the aggregate amount, for the said three years, of the sum of £——, the estimated yearly pro-

Allowance to be made on account of deficiency in the business brought by the respective partners.

(*b*) Though this clause gives the precedent the appearance of being rather special, yet, as it does not vary the form of it farther than by simply adding to its contents, any person using the precedent has only to reject the clause in cases where it is not wanted.

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fits of the business or practice of the said [A. B.]; And if it shall appear that the net gains and profits of the business or practice which shall have come through the said [C. D.] have not, on the average of the said first three years, amounted in each of such years to the sum of £——; and that the net gains and profits of the business or practice which shall have come through the said [A. B.] have, on the average of the said first three years, amounted in each of such years to the sum of £——; Then, that he the said [C.D.], his heirs, executors, or administrators, shall and will, on demand, pay to the said [A. B.], his executors or administrators, one fourth part of the difference between the aggregate amount of the net gains and profits, for the said first three years, of the business or practice which shall have come through the said [C. D.], and the sum of £——, the aggregate amount, for the said three years, of the sum of £——, the estimated yearly profits of the business or practice of the said [C. D.]: And if it shall appear that the net gains and profits of the business or practice which shall have come through each of them the said [A. B.] and [C. D.] have not, on the average of the said first three years, amounted in each of such years, as to the business or practice coming through the said [A. B.], to the sum of £——, *and, as to the business or practice coming through the said [C. D.], to the sum of £——; Then, if the surplus or residue of the one fourth part of the said [C. D.], of the aggregate amount for the said three years of the net gains and profits of the whole of the partnership business coming through as well the said [A. B.] as the said [C. D.], after deducting or giving credit for the aggregate amount for the said three years of the net gains and profits of the business or practice which shall have come through the said [C. D.], shall amount to less than the sum of £——, the consideration so as aforesaid paid by the said [C. D.] to the said [A. B.], that the said [A. B.], his heirs, executors, or administrators, shall and will, on demand, pay or refund to the said [C. D.], his executors or administrators, the difference between the amount of such surplus or residue, and the said sum of £——: But if the surplus or residue of the one fourth part of the said [C. D.] of the aggregate amount for the said three years of the net gains and profits of the whole of the said partnership business or practice, after making such deduction or giving

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such credit as aforesaid, shall amount to more than the said sum of £——; Then that he the said [C. D.], his heirs, executors, or administrators, shall and will, on demand, pay to the said [A. B.], his executors, or administrators, the difference between the said sum of £—— and such last-mentioned surplus or residue: And if it shall appear that the net gains and profits of the business or practice which shall have come through the said [A. B.] have, on the average of the said first three years, amounted in each of such years to the sum of £——, or more than that sum; and that the net gains and profits of the business or practice which shall have come through the said [C. D.] have, on the average of the said first three years, amounted in each of such years to the sum of £——, or more than that sum; Then no allowance or sum of money is to be made or paid by either of them the said [A. B.] and [C. D.] to the other of them, in consequence of the net gains and profits of the business or practice which shall have come through one of them, being more or less, or proportionately more or less, than the net gains and profits of the business or practice which shall have come through the other of them.

[55]

Premium to be retained in case of death.

That if both or either of them the said [A. B.] and [C. D.] shall depart this life before the expiration of the said first three years of the said partnership term, then the said [A. B.], his executors, or administrators, shall and may retain the whole of the said consideration or sum of £—— (*c*); and no allowance or sum of money shall be made or paid by either of them the said [A. B.] and [C. D.], or his executors or administrators, to the other of them, or his executors or administrators, on account or in the event of the net gains and profits of the business or practice which shall have come through them the said [A. B.] and [C. D.], respectively, amounting to less than the said respective estimated yearly sums of £—— and £——.

Premiums with articled clerks, and fees arising from receiverships, &c. to be considered as profits.

That all premiums which shall be received with articled clerks, and all fees, emoluments, and benefits, that shall arise from the exercise by the said partners respectively of the offices of steward, receiver, agent, or court keeper, of any other person or persons, or of the office of vestry clerk,

(*c*) As to a partner's right to a return of premium paid on entering into partnership, *vide ante*, p. 46.

or of any other public office whatever, shall be considered and accounted for as profits of the said partnership.

Sums to be drawn out monthly by the respective partners.

THAT the said [A. B.] shall be at liberty to draw out of the funds of the said partnership for his personal expenses the sum of £—— by monthly instalments, during any current year of the said partnership; and the said [C. D.] shall be at liberty to draw out the annual sum of £—— in the like manner; and the sums which shall be so respectively drawn out by the said partners shall be in part or in full satisfaction, as the case may be, of their respective shares of the profits of the said partnership (*d*).

[*56]

Expenses of partnership business.

THAT the rent, taxes, costs of fire insurance, and other *expenses which shall become payable in respect of the offices or chambers in which the said partnership business shall be carried on, the expenses of providing stationery, and of paying clerks and servants to be employed in the partnership business, the expense of fees to counsel for advice, and of travelling, and all other charges and expenses which may be incurred by the said partners respectively in the course of the said business, and all losses, costs, and damages which may be incurred on account of the said business, shall be paid and borne out of the profits of the said business, or out of the capital stock, estate, and effects of the said business, except any such loss or damage shall happen through the wilful neglect or default of either of the said partners; in which case the same shall be made good by the person through whose default the same shall happen.

Partners to keep proper accounts.

THAT the said partners respectively shall from time to time during the continuance of the said partnership, write or cause to be written into the books of account which

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(*d*) If so intended, add,

Partners to refund excess drawn out.

"That if the sums drawn out as aforesaid by the said partners, or either of them, during any current year of the said partnership, shall exceed the amount of their or his respective shares or share of the net gains and profits which shall have accrued in such year, then such partners or partner shall respectively refund such excess as soon as the same shall be ascertained at the taking of the general yearly account as hereinafter mentioned."

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shall be kept for that purpose, true, plain, and perfect entries of all such monies and business as shall be received, paid, or transacted by the said partners, or either of them, or their clerks or agents, and of all such other matters or things as shall be or ought to be entered in the same books in the usual and regular course of the said business, with all such circumstances of names, dates, times, and places as may be necessary or convenient for better understanding the same. And the said books of account shall be kept in the offices of the said partnership, or some other place to be appropriated for the purpose by mutual consent, and not elsewhere; and shall at all convenient times be open to the inspection of both the said partners.

Each partner to devote his whole time.

THAT the said partners respectively shall be true and just to each other in all their contracts, sales, reckonings, receipts, payments, and dealings, and shall, at all times during the said partnership, devote their whole time and attention to the conduct and management of the said business and the concerns of the said partnership, unless they shall be prevented by sickness or other reasonable cause of excuse arising without their own respective default.

Neither partner to undertake any suit, &c. after being required by the other not to do so.

THAT neither of the said partners shall undertake the prosecution of any cause or suit, or transact any business, or enter into any contract with any person or persons, *after he shall be required by the other of the said partners not to do the same.

[*57]

Not to compound or release debts.

THAT neither of the said partners, without the consent of the other of them, shall compound, release, or discharge any debt or duty which shall be due or owing to the said partnership, without receiving the full amount thereof, or shall draw or accept any bill of exchange or promissory note, or contract any debt on account of the said partnership, except in the usual and regular course of business, and for the benefit of the said partnership.

Not to assign share, &c.

THAT neither of the said partners shall assign over his share or interest in the said partnership effects, or withdraw for his private use the whole or any part of his share of the capital stock of the said partnership, or become bail or surety for any person or persons whomsoever, or carry on, either separately or in partnership with any other person or persons, the profession or business of an attorney at law, so-

licitor or conveyancer, or any other trade or business whatsoever, without the consent of the other of them, or knowingly or willingly do, commit, or permit any act, matter, or thing whatsoever, by means of which the said partnership monies or effects shall be seized, attached, extended, or taken in execution. BETWEEN TWO SOLICITORS.

Accounts to be made up annually.

THAT during the continuance of the said partnership, within two calendar months after the —— day of —— in every year, unless the said partners or either of them shall be prevented by illness, and then as soon after the said period as circumstances will permit, the said partners shall make a full and particular account in writing of all the monies, credits, and effects due and belonging to the said partnership, and of all debts due or owing by or from the said partnership to any person or persons by reason thereof: which said annual account shall, within the time aforesaid, be written in two books, to be respectively subscribed by the said partners; and after such subscription each of the said partners shall take one of the said books into his custody, and shall be concluded by the said account, unless some error shall appear therein, and be notified within the space of twelve calendar months next after the taking of such account, and then the said account shall be opened so far only as to rectify such error: And that upon the making up of every such yearly account, all interest which *shall [*58] become due to either of the said partners for any sum or sums of money to be lent by him to the said partnership, shall, in the first place, be taken by the partner lending the same; and afterwards the said partners respectively shall divide between them, in the proportions aforesaid, the clear profits of the said partnership business which shall have accrued or been gained in the preceding year.

Power to either partner to dissolve the partnership by notice on certain acts or defaults by the other.

THAT if, contrary to the several agreements hereinbefore contained, either of the said partners shall, to the detriment or injury of the said partnership business, neglect or refuse to employ himself diligently therein, unless prevented by illness or other sufficient cause, or shall wilfully neglect or refuse to keep proper and just accounts, or shall embezzle or apply to his own private use any of the monies or property of the said partnership; or shall make, draw, indorse,

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or accept any promissory note or bill of exchange, guarantee, or other contract, in the name of the said partnership, for his own private benefit and advantage; or shall assign his share or interest in the said partnership, or withdraw for his private use the whole or any part of his share of the capital stock, or shall become bound as bail or surety for any person or persons; or shall carry on, either separately or in partnership with any other person or persons, the profession or business of an attorney, solicitor, or conveyancer, or any other trade or business whatsoever, without the consent of the other of them; or in case either of the said partners shall file or present any petition, with a view to take the benefit of any act for the relief of Insolvent Debtors, or shall suffer his body to remain in execution for more than one calendar month; or shall do, commit, or permit to be done, any other act, matter, or thing whatsoever, by which, or by means of which, the said partnership monies or effects shall or may be seized, attached, extended, or taken in execution: Then and in any of the said cases the other of the said partners, if he shall think fit, shall be at liberty to dissolve the said partnership, by giving to the partner who shall offend in any of the particulars aforesaid, or leaving at his dwelling-house or place of abode a notice in writing, declaring the said partnership to be dissolved and determined; and the said partnership shall, from the time of giving or leaving such notice, or from any other time to be therein [*59] *appointed for the purpose, absolutely cease and determine accordingly; without prejudice, nevertheless, to the remedies of the respective partners for the breach or non-performance of all or any of the covenants herein contained, at any time or times before the determination of the said partnership (*e*).

(*e*) It may be proper to add,

Expelled partner not to practise for a certain period.

"That in case the said partnership shall be dissolved by the means lastly hereinbefore mentioned, the said partner, whose misconduct shall have occasioned such dissolution, shall not nor will, for the space of seven years thenceforth, either alone or in partnership with any other person or per-

BETWEEN TWO SOLICITORS.

That in case the said partnership shall determine by the decease of either of the said partners during the said term of —— years, the surviving partner, and the executors or administrators of the deceased partner, shall, as soon as conveniently may be after the determination thereof, make out a statement of the accounts and transactions of the said partnership up to the period of such decease; and the surviving partner shall proceed with all convenient speed to collect and get in the credits of the said partnership; and after paying thereout all and every sum and sums of money owing by the said partnership, shall, *from time to time, as often as the monies in his hands shall amount to the sum of £——, pay over to an account with the executors or administrators of the deceased partner for their share or proportion thereof; and the expenses attending the winding up and adjustment of the said accounts, and the collection and receipt of the said credits, shall be paid out of the partnership funds.

Adjustment of accounts on the decease of either partner.

[*60]

That in the event of the determination of the said partnership by the means last aforesaid, the printed books, office fixtures, and furniture, and other property of the

Books, &c. to be valued.

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sons, follow or practise the profession or business of an attorney, solicitor, or conveyancer, at —— aforesaid, or within ten miles distant therefrom*."

Or, "shall not nor will, either alone, &c. for the space of seven years after the dissolution of the said partnership, be concerned professionally, or transact any business, either as principal or clerk, for any person or persons who shall have been a client or clients of the said partnership."

Or not to transact business fore the clients of th firm.

"And if such partner shall in any respect break or infringe this present covenant, then and in such case he the said partner so breaking or infringing the same, his heirs, executors, or administrators, shall immediately thereupon pay to the other of the parties hereto, his executors or administrators, the sum of £—— as and for liquidated damages, and not by way of penalty."

On breach of covenant to pay a certain sum as liquidated damages.

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* This clause is rather severe. The next seems better adapted to the justice of the case.

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said partnership (except as hereinafter mentioned) shall be valued by two indifferent persons, the one to be chosen by the surviving partner, and the other by the executors or administrators of the deceased partner; and the same shall be purchased by the surviving partner, if he shall think fit, at the amount of such valuation; and the sum so to be paid by him shall form part of the partnership effects; but that all deeds, drafts of deeds, and other papers belonging to clients or otherwise, which shall be in the custody of the said partners, or either of them, on account of the said partnership, at the time of the decease of either of them as aforesaid, shall (subject to the claims of the persons, if any, to whom they may happen to belong) remain in the hands of or be delivered to the surviving partner (*f*).

As to the custody of drafts and other papers.

(*f*) In preparing articles of partnership between solicitors, provision should always be made, in the event of a dissolution, for the destination of the papers in the possession of the firm; this being a point of considerable importance where the dissolving partners intend to practise separately, because, *cæteris paribus*, clients generally resort to the partner who has the custody of their papers. It is true, indeed, that the drafts and copies of deeds usually retained by solicitors belong to the clients themselves, and the Court of King's Bench, in a late case, ordered them to be delivered up at the instance of a client, at whose expense they had been prepared, on the ground that "he who pays for the drafts by law has a right to the possession of them." *Ex parte Horsfall*, 7 Barn. & Cress. 528. Upon this principle, too, Sir *J. Leach*, V.C., recently refused the aid of the Court to a solicitor seeking to take such papers out of the custody of the assignees of his late partner, who had become bankrupt, his Honour observing "that he had no right to order the papers of the clients to be delivered to one of the partners without the consent of the clients." *Davidson* v. *Napier*, 1 Sim. & Stu. 97.

[61]

It is not too readily to be inferred from this case that the Courts would in no instance enforce a stipulation between solicitors respecting the custody of their clients' papers; for, though such a stipulation might be, and undoubtedly is, void in regard to the clients, there seems to be no reason why it should not be binding on the parties themselves; and cases might be suggested, in which the Court interferes to regulate the conflicting claims of parties, notwithstanding the existence of a paramount right in a third person. In *Davidson* v. *Napier*, it does not appear that there was any agreement between the parties respecting the custody of the papers; and, therefore, the assignees of the bankrupt partner had as good a right

BETWEEN TWO SOLICITORS.

Affairs how to be wound up at the dissolution.

THAT, in case of the dissolution of the said partnership by effluxion of time, or otherwise, during the lives of both the said partners, they the said partners shall, as soon as conveniently may be after such dissolution, make out a general statement of the partnership affairs, and transactions, and pecuniary accounts: and, after making an effectual provision for the liquidation of the debts owing from the said partnership, shall make a distribution, division, and allotment of the partnership credits, property, and effects between them, according to their said several *proportions [*62] and interests therein; or in case it shall be deemed more expedient so to do, the same credits, property, and effects shall be collected, got in, and converted into money on the joint account of the said partners: And the deeds, drafts of deeds, and other documents and papers in the custody of the said parties respectively as such partners as aforesaid, shall be divided between them in manner following (that is to say): The papers relating to the business of persons who were clients of either of the said partners before the formation of the said partnership, shall (unless the contrary be

Provision as to the custody of the papers belonging to the firm.

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to the possession of them as the solvent partner, or, in other words, the assignee of one tenant in common was entitled to retain against the other tenant in common the possession of their common property.

As to the division of the business on a dissolution.

Solicitors dissolving partnership frequently agree to divide the business pending in the office; but such an arrangement is, upon a principle analogous to that just adverted to, void against the clients, who, having employed both, have a right, under such retainer, to the benefit of their joint exertions.

In a late case, where two solicitors in partnership had been concerned in defending a suit, and they dissolved partnership, and the party to the suit continued to employ one of them, Lord *Eldon* held that the other was not entitled to consider himself as discharged, so as to be capable of acting for the opposite party. Earl *Cholmondeley* v. Lord *Clinton*, 19 Ves. 261. The client in this case had employed one of the late partners; but the rule, it is apprehended, is not confined to such a case, but would apply, if he had refused to employ either separately: both the partners would still have been incapacitated from being concerned against him, the relation of solicitor and client having been determined by their own act, and not by that of the client; and their situation, therefore, being that of a person who has voluntarily withdrawn from the management of a suit. *Cook* v. *Rhodes*, 19 Ves. 273, n.

BETWEEN TWO SOLICITORS.

expressly directed by such clients) be committed to the custody of the partner whose clients such persons formerly were; and with respect to the papers relating to the business of clients not included in this class, the same shall be equally divided between the said partners: And in case any dispute shall arise as to the custody of the papers in any particular business, it shall be referred to the client, to whose business they relate, to determine to which of the partners the said papers shall be delivered. Provided, nevertheless, that nothing herein contained shall prejudice or affect any lien which the said parties may have, either on the partnership account or otherwise, on any deeds or writings in their respective hands or custody. IN WITNESS, &c. (*g*).

Disputes respecting them to be referred to client.

(*g*) A person preparing a partnership-deed between solicitors from these precedents, should peruse this and the two subsequent precedents, as it has not been thought necessary to supply in each precedent every clause, however proper, which was to be found in the others.

[63]

BETWEEN TWO SOLICITORS.

ARTICLES *of* PARTNERSHIP (*a*) *between* TWO SOLICITORS, *one of whom intends to* WITHDRAW *his* NAME, *and gradually to* RETIRE *from the* MANAGEMENT *of the* BUSINESS, *but has an Option to become Partner for an extended Period, and upon new Terms, on the re-payment of a Moiety of a Sum of Money now advanced by the other for the Purchase of his Fixtures, &c. Stipulations as to Change in the Name of the Firm, &c.*

In consideration of £——, by [C. D.] to

ARTICLES OF AGREEMENT made and entered into this —— day of ——, BETWEEN [A. B.], of &c., of the

(*a*) These articles appear to have been not under seal. A deed is always to be preferred, because an action of covenant can be maintained for a breach of the stipulations in it, and they are binding on the representatives of the contracting parties, as specialty obligations. Where the

one part; and [C. D.], of &c., of the other part; WHEREBY, in consideration of the mutual confidence which the parties have in each other, and of the sum of £—— of lawful money of Great Britain and Ireland paid by the said [C.D.] to the said [A. B.], for the purchase of the furniture, fixtures, books, and other things in the present offices of the said [A. B.], in —— Street, in ——, and of the lease of the said offices, the receipt of which said sum of £—— the said [A. B.] doth hereby acknowledge: *It is agreed between and by the said parties as follows* (that is to say):

BETWEEN TWO SOLICITORS.

[A. B.], for the purchase of the furniture, &c. in the offices of [A. B.], and the lease—

THAT the said parties shall become and remain copartners in the business of an attorney, solicitor, and conveyancer, from the first day of January next, for the term of four years, if both of them should so long live.

It was agreed that the parties should become co-partners.

For four years.

*THAT the said business shall be carried on at the offices aforesaid, under the style and firm of [A. B.] and [C. D.] for the first year, and afterwards in the name of the said [C. D.] alone, if he, the said [C. D.], shall think proper to discontinue the name of the said [A. B.]

Change in style of the firm.

[*64]

THAT, upon the request and at the expense of the said [C. D.], the said [A. B.] shall assign, or otherwise make over to the said [C. D.], the said furniture, fixtures, books, things, and lease so purchased by the said [C. D.] as aforesaid, but the same shall be used for the purposes of the said copartnership.

[A. B.] to assign to [C. D.] the lease on request.

THAT the sum of £—— shall be the capital of the copartnership, and shall be contributed by the said parties in equal shares: And the said capital and the profits arising from the said business shall (subject as hereinafter is mentioned) be used and employed in the said business.

Capital of the copartnership.

THAT all the expenses and losses of the said business shall be defrayed and borne out of the said profits and capital; and if such profits and capital shall become deficient, then by the said parties out of their respective separate estates, in the proportions in which, under this agreement, they shall for the time being be entitled to the net profits.

Expenses and losses of the business, how to be defrayed.

THAT the said [C. D.] shall be entitled, during the said copartnership, to receive out of the net profits of the said

Allowance to [C. D.], in respect of the mo-

articles are not under seal, they are only liable to an agreement stamp: where they are, of course the common deed stamp attaches.

BETWEEN TWO SOLICITORS.

business the sum of 7*l.* 10*s. per centum per annum*, on the said sum of £——, advanced by him to the said [A. B.] as aforesaid, to be computed from the date of this agreement.

ney advanced by him.

Remainder of profits, how to be divided.

THAT the said parties shall be entitled to the remainder of the net profits arising from the said business in the following proportions (that is to say), for the first year of the said copartnership in equal proportions, and for the remaining three years of the said copartnership the said [A. B.] shall be entitled to one third, and the said [C. D.] to the remaining two thirds: And that in the first year of the said copartnership it shall be lawful for each of the said copartners to draw out of the funds thereof the sum of £—— for his own private use, and in every subsequent year thereof it shall be lawful for the said [A. B.] to draw out of the said copartnership funds the sum of £——; and the

[*65] *said [C. D.] the sum of——; but so, nevertheless, that the said partners respectively shall not draw out in any one quarter of a year more than one fourth part of the annual sums which they respectively shall be entitled to draw out during the current year, by way of anticipation.

That proper books of accounts should be kept, and, together with all papers, &c. deposited at the offices.

THAT proper books of account shall be kept by the parties, and that the same, together with all letters, papers, instruments, and writings, relating to the said business, shall be deposited in the offices wherein the same shall be carried on; and that each of the said parties shall have free access thereto.

That [C. D.] should devote all his time to the business.

THAT the said [C. D.] shall devote the whole of his time to the said business, and superintend the management thereof, and diligently employ himself therein, and promote, to the utmost of his power, the benefit and advantage of the copartnership.

That [A. B.] should the first year devote the whole of the morning, except certain times; and afterwards should not be obliged to attend.

THAT the said [A. B.] shall, during the first year of the copartnership, devote the whole of the morning of each day to the said business (except Sundays, and excepting when he shall be at either of the Universities for the purpose of keeping his terms), and that for the remainder of the copartnership the said [A. B.] shall not be obliged to attend to the said business any further than he shall think proper; but that, so far as he shall attend to the said business, he shall carry on the same for the greatest benefit and advantage of the copartnership.

Parties to be

THAT each of the said copartners shall be just and faith-

BETWEEN TWO SOLICITORS.

ful to the other of them in all transactions relating to the copartnership: And that neither of them shall, without the previous consent in writing of the other of them, employ any of the monies or effects belonging to the copartnership, or engage the credit thereof in any matter or thing, except upon the account and for the benefit of the copartnership: And that neither of them shall, without the previous consent in writing of the other of them, enter into any bond as surety, or become bound as bail, for any person or persons whomsoever, or do or execute any act, deed, or thing whatsoever, whereby the other of the said parties, or the monies or effects of the copartnership, shall or may be charged, attached, or affected: And that each of them shall pay his separate debts, and shall at all *times indemnify the other of them, and the monies and effects of the copartnership, from the said debts, and from all actions, claims, and demands for or on account of the same.

faithful towards each other; and neither to employ the monies except for the purpose of the copartnership: nor without the other's consent become bail, &c.

[*66]

That each should pay his separate debts, and indemnify the copartner ship therefrom.

That a yearly account should be made out.

That the said parties shall, on the —— day of ——, in every year during the copartnership, or within twenty days afterwards at the farthest, join in making and stating a true, just, plain, and perfect general account and reckoning in writing, of and concerning all business and transactions whatever relating to the copartnership, and of and concerning all monies, credits, and effects that shall then for the time being be due, owing, or belonging to them in respect of the copartnership: And of and concerning all debts which they, the said parties, shall then owe to any person or persons whomsoever, in respect of the copartnership. *And* after payment and deduction of all monies, debts, and expenses, then due, owing, or incurred, from or by the said copartnership, the said parties shall, with all convenient speed, divide between them, in the proportions in which they shall, for the time being, be respectively entitled thereto, under the provisions hereinbefore contained, such of the said net gains and profits of the copartnership as shall then, for the time being, have been collected and gotten in, and shall not have been previously taken out by the said parties respectively (*b*).

And the parties divide the gains.

(*b*) It seems proper to add:—

"And if the sums drawn out by the parties respectively, un-

BETWEEN TWO SOLICITORS.

That if [C. D.] should die during the copartnership, [A. B.] should be at liberty to take, at a valuation, the furniture, &c. purchased by [C. D.]

THAT if the said [C. D.] shall die during the copartnership, then, and in such case, the said [A. B.] shall be at liberty to take, at a fair valuation to be made by some indifferent person to be appointed by him the said [A. B.], and the executors or administrators of the said [C. D.], within one calendar month after the decease of the said [C. D.], the furniture, fixtures, books, things, and lease, so purchased by the said [C. D.] as aforesaid, on paying to *the executors or administrators of the said [C. D.] the amount of such valuation within two calendar months after the decease of the said [C. D.]: And on such payment being made, the executors or administrators of the said [C. D.] shall assign or otherwise make over the said furniture, fixtures, books, things, and lease, to the said [A. B.], at the exense of the said [A. B.].

[*67]

Winding up of the affairs at the expiration of the copartnership.

THAT within the space of two calendar months after the expiration of the copartnership by lapse of time, or by the death of one of the said parties, or by any other means, an account in writing shall be stated and settled between the said parties respectively, or their respective executors or administrators, of all the monies, credits, or effects of or belonging to, and all the debts and monies due and owing from or by the copartnership: And that upon the finishing of such last-mentioned account, the said parties respectively, or their respective executors or administrators, shall forthwith make due provision for the payment and satisfaction of such debts and engagements as shall then appear to be due from the copartnership: And the balance of the copartnership monies and effects, or other the matters to be included in such general account, shall, after making such provision as aforesaid, be divided between the said parties respectively, or their respective executors or administrators, in the proportions in which they shall be respectively entitled thereto under the provisions hereinbefore contained: And, after making such division, such instruments in writing shall be executed by the said parties respectively, or their respec-

The payment of debts.

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der the stipulation aforesaid, shall be found to have exceeded their respective shares of the gains and profits of the said copartnership, the excess shall be immediately refunded by such partners respectively."

BETWEEN TWO SOLICITORS.

tive executors or administrators, for facilitating the getting in of the debts and effects outstanding; and for indemnifying each other touching the premises; and for vesting the sole right and property in the said respective shares of and in the said credits and effects in the parties to whom the same respectively shall, upon such division, belong; and for releasing to each other all claims on account of the copartnership, as are usual in cases of the like nature.

On the death of [A. B.], or the discontinuance of his name, [C. D.] to take an assignment of an articled clerk of [A. B.]

THAT, upon the death of the said [A. B.], or the discontinuance of his name in the firm of the copartnership, the said [C. D.] shall, without any premium or consideration whatever, take an assignment of [T. S.], (an articled *clerk of the said [A. B.]), for the remainder of the term for which he was articled to the said [A. B.]

[*68]

If, during the term, [A. B.] should pay to [C. D.] a moiety of the sum paid by him for the furniture, &c. a new partnership between them to commence.

THAT, at any time after the expiration of the first year of the copartnership, and during the continuance thereof, the said [A. B.] shall, on paying to the said [C. D.] one moiety of the said sum of £ ——, so paid by the said [C. D.] to the said [A. B.], for the purchase of the said furniture, fixtures, books, things, and lease, as hereinbefore mentioned, become entitled to one moiety of the said furniture, fixtures, books, things, and lease, and be thenceforth a partner with the said [C. D.] in the said business, under the firm of [A. B.] and [C. D.], for the term of fourteen years, if both of them should so long live; and on the commencement of such second copartnership, the first copartnership shall immediately cease and determine: And during the second copartnership the said [C. D.] shall not be allowed the 7*l.* 10*s.* *per centum*, to which, as hereinbefore is mentioned, he is entitled during the first copartnership; and during the second copartnership the said [A. B.] and [C. D.] shall share equally in the profits and losses thereof, and shall pay equal attention to the said business; but in every other respect the said second copartnership shall be carried on, managed, and conducted precisely in the same manner, and upon the same terms and conditions as the said first copartnership is, by this agreement, to be carried on, managed, and conducted, or as near thereto as circumstances will permit: And articles of copartnership shall be prepared and executed by the said parties, for carrying into effect the intention

BETWEEN TWO SOLICITORS.

above expressed in respect to such second copartnership (*c*). In witness, &c.

(*c*) Many of the clauses proper to be introduced into partnership articles between solicitors are omitted in this precedent, but will be found in the foregoing and following precedents.

BETWEEN TWO SOLICITORS.

DEED *of* PARTNERSHIP *between two* Solicitors, *in Consideration of a* Premium *by one of them covenanted to be paid by* Instalments. Special Provisions *for* apportioning *the* Labours *of the* Business: *Also as to Business to be* transacted *for* Relations: *For a Return of Part of the* Premium *in case of* Business *not* yielding *a* certain *Profit: Also in case of* Death *within a given* Period. *On the* Death *of* either *within the Term,* Business *to be* carried on *by surviving* Partner *for the* Benefit *of* himself *and the* Representatives *of the* deceased Partner *for a prescribed Period, and then the* Affairs *to be* wound *up.* Power *to Senior Partner to* retire *on* giving Notice; *in which case he covenants not to practise, but to do all in his Power to promote the Interest of the other.* Provisions *respecting the* Custody *of* Papers *at the* Dissolution, *&c.* (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, Between [A. A.], of &c. of the one part; and [B. B.], of

(*a*) This precedent is taken from a draft of Mr. Fearne—a text writer, whose productions, familiar to every student of real property law, bear the impress of a mind of great original power, imbued with classic learning and science, which enabled him to impart an interest and lustre to

&c., of the other part: WHEREAS the said [A. A.] hath, by great application and assiduity, established a considerable share of business in the profession of an attorney and solicitor; and the said [A. A.] and [B. B.] have mutually agreed to enter into copartnership, and to practise and carry on the business or profession of attornies and solicitors, as joint practisers, for and during the term of twenty-one years, if both the said parties shall so long live, and upon, subject to, and under the terms, conditions, and agreements hereinafter mentioned; And it is agreed between the said parties to these presents that the said copartnership shall commence at such time as is hereinafter for that purpose mentioned: NOW THIS INDENTURE WITNESSETH, that, for and in consideration of the sum of £——, of &c., to be paid by the said [B. B.] to the said [A. A.] on or before the —— day of —— next ensuing the date of these presents, and of the further sum of £——, to be secured to be paid by the said [B. B.] at the expiration of four years from the commencement of the said copartnership, according to the covenant hereinafter in that behalf contained; And for and in consideration of the mutual trust and confidence which they repose in each other, and in order to improve and increase their respective fortunes, *It*

BETWEEN TWO SOLICITORS.

Recital of agreement to become partners.

Testatum.

Parties agree to

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the driest subjects of legal investigation; though some of the doctrines contained in his elaborate and celebrated work are now become obsolete, and others, to an extent not generally apprehended, rest upon principles extremely questionable. The Editor would hardly have ventured the latter assertion, without an opportunity (which is here necessarily denied him) of explaining the reasons on which it is founded, were it not that they have been recently placed before the profession by his friend, Mr. Hayes, who, in a publication embracing many other topics of discussion, has entered rather fully into the consideration of the doctrines in question. See Hayes's Principles for Expounding Dispositions of Real Estate, &c.

The precedent in the text is not quite free from the vice of prolixity, which characterized the drafts of even the most eminent conveyancers of the last century; but the Editor has chosen rather to commit the pruning knife to his readers than to employ it himself, anxious that they may be presented with a specimen, entire and untouched, of the conveyancing style of the author of the Essay on Contingent Remainders and Executory Devises. Some of the various clauses are well adapted to be extensively useful.

BETWEEN TWO SOLICITORS.

become copartners.

is hereby mutually agreed by and between the said parties to these presents in manner following, that is to say: First, the said [A. A.] and [B. B.], each of them, for himself, his executors, and administrators, doth hereby covenant, promise, and agree to and with the other of them, his executors, administrators, and assigns respectively, that they

[*71] the said *[A. A.] and [B. B.] shall and will become copartners, and jointly carry on the business or practice of attornies and solicitors for the term and upon the conditions

Commencement and duration of partnership.

and agreements hereinafter mentioned, that is to say: That the copartnership business or joint practice shall begin and commence on the —— day of —— next ensuing the day of the date of these presents, and shall continue for and during the said term of twenty-one years thenceforth next ensuing, and fully to be complete and ended, if both the said parties

Place of business.

shall so long live; And that such copartnership or joint practice, during the continuance thereof, shall be carried on in the joint names of the said [A. A.] and [B. B.], in the house now in the occupation of the said ——, situate &c., or in such other chambers or dwelling-house as they the said [A. A.] and [B. B.] shall mutually approve; and at the expiration or sooner determination of the same term, the same house, if then employed in carrying on the said business, or other the dwelling-house in which the said business shall be then carried on, if it be the dwelling-house of the said [A. A.], shall be delivered up into the quiet possession

Each party to employ himself diligently.

of the said [A. A.]; And also that each of the said parties shall and will diligently, faithfully, and constantly apply and employ themselves in carrying on and managing all suits at law and in equity, conveyancing, stewardships, and receiverships, and all and every other business which they shall or may be employed or concerned in during the con-

Arrangement of the labours of the business.

tinuance of the said copartnership; And that, in order to ascertain the particular province of each of the said copartners, in the conduct of the business of the said copartnership or joint practice, it is mutually agreed that they shall divide the business of the clients between them by an alphabetical distribution thereof into two classes, according to the initial letters of the surnames of such clients; the one class to consist of the business of clients the initial letters of whose surnames are any of the alternate letters of the alpha-

BETWEEN TWO SOLICITORS.

bet, beginning with A, omitting B, proceeding to C, omitting D, proceeding to E, and so progressively omitting the next, and taking the next letter but one alternately through the whole alphabet; the other class to consist of the business of clients, the initial *letters of whose surnames are any [*72] of the alternate letters, beginning with B, omitting C, proceeding to D, omitting E, going on to F, and so progressively omitting the letters taken in the first class, and taking in those omitted in the first class alternately through the whole alphabet; And that the said [A. A.] shall take upon himself the particular management and transaction of the business and concerns of the clients of the said copartnership whose business shall fall under the said first class, consisting of clients whose surnames begin with A, or any of the said subsequent alternate letters of the alphabet in the same class aforesaid; And that the said [B. B.] shall take upon himself to transact the business and concerns of the clients of the said copartnership whose business shall fall under the latter class aforesaid, consisting of clients whose surnames begin with B, or any of the said subsequent alternate letters of the alphabet in the same class aforesaid; unless the said [A. A.] and [B. B.] shall agree and determine that such business and joint practice shall be carried on and conducted in any other mode or manner; and also, unless any of the clients of the said copartners shall express their wish or desire that one of the said parties only shall carry on and attend to the particular business of such clients; in which last-mentioned case the partner who shall be so chosen for that purpose shall have the sole conduct and management of the business of the client requesting the same, and attend such client thereupon; but such business shall be carried on upon the joint account, and for the joint benefit of the said copartners: And it is hereby agreed, that the particular business in which either of the said parties shall be employed or engaged in by their respective families in the degree of relationship of mother, brother, or sister (and not otherwise), shall be transacted by the party for whose relation such business shall be done; and such party shall be at liberty to transact such business at his own risque, without fee or reward; But in case any emolument shall arise therefrom, such emolument or

Either party may transact business for relations without fees;

But if any gain, the same to go

BETWEEN TWO SOLICITORS.

profit shall go to the general or joint stock of the said copartnership, for the benefit of both the said copartners: PROVIDED ALWAYS, *and it is hereby agreed and declared,* that the said [A. A.] shall have the sole conduct *and management of the various business and concerns of the late Mr. W., deceased, his predecessor in the said business or profession, now remaining unsettled, at his own risque and charges, and for his own sole and separate benefit: AND *it is hereby also mutually agreed,* that each of the said copartners shall, on the —— day of —— now next ensuing, pay the sum of £—— into the hands of Messrs. ——, of ——, bankers, in order to make up a fund of £—— for carrying on the said copartnership business; And that such fund shall from time to time be kept up between them for the purposes aforesaid, in equal proportions: And that in case either of the said partners shall at any time or times, with the consent of the other of them, advance or lend any sum or sums of money to the said copartnership for carrying on the said joint business, then and in every such case the joint stock of the said copartnership, and the gains and profits thereof, shall at all times be liable to refund and pay to the party so advancing the same, his executors, administrators, or assigns, all and every such sum and sums of money so to be lent or advanced, with interest for the same after the rate of *5l. per cent. per annum,* from the time or times of advancing or lending the same, until the same shall be fully repaid and satisfied: And also that all monies received for and on account of the said copartnership or joint practice shall, immediately on receipt thereof, be paid into and become part of the joint estate of the said copartnership, and be entered into proper books of account to be kept for that purpose, and for the entry of all transactions relative to the said copartnership or joint practice; which books shall be kept during the said copartnership in the dwelling-house or office in which the said joint business shall be carried on, so that each of the said parties may constantly have access to inspect, examine, and make extracts from the same at pleasure: That each of the said parties shall severally defray and sustain an equal moiety or half part of or in the losses, charges, or expenses that shall or may arise or happen from time to time, or be sustained in the said copart-

to the joint stock.

One of the partners to have certain business for his own benefit.

[*73]

Each party to pay into bankers' hands a sum of money towards the joint stock.

In case either advances more than his share, the funds to be liable to repay.

Monies received to go to the joint stock.

Account of monies received to be kept at offices.

Losses, &c. to be borne equally.

nership or joint practice; and shall severally be entitled to have and receive one equal moiety or half part of and in all emoluments or profits that shall from *time to time arise or be produced from the said co-partnership or joint practice, for and during the said term of twenty-one years, if both the said parties shall so long live: *And also* that all and every sum or sums of money which shall at any time during the continuance of the said copartnership be had and received as a fee or fees with any articled clerk or clerks to be taken by either of the said parties, shall be shared and divided between the said [A. A.] and [B. B.] in equal proportions; and that neither of the said parties shall take any such articled clerk or clerks without the consent of the other of them: AND *it is hereby mutually covenanted, concluded, and agreed upon*, by and between the said parties to these presents, that all usual and customary fees to counsel, and other payments and disbursements necessarily attendant upon and conducive to the management and carrying on of the business or joint practice of the said copartnership, and which shall from time to time be laid out and expended therein, or in the salaries of clerks, in fees and charges at offices, and of clerks in court, and otherwise, and also in the rent of the said house or other the house where the said joint business or joint practice shall be carried on, and the wages of servants, and the expenses of coals and candles, so far as relates to the carrying on of the said business, shall be borne, defrayed, and sustained by the said parties in equal proportions: *And that*, in case the emoluments and profits arising and to be produced from the business of the said copartnership, including fees with any articled clerk to be taken, or other extra fees or gratuities to the said copartners for the joint account of the said copartnership (after payment of or deducting thereout the rent of the house where such joint practice shall be carried on, and the salary or wages of clerks and servants, and all other office expenses and disbursements), shall not, at the end of the first four years of the said term, in case both the said partners shall be then living, upon the accounts of the said copartnership fairly stated and settled, appear to be in specie or in the books the net sum of £——, Then and in such case the net profits shall be deducted from the said sum of £——; and the said [A. A.] shall return and pay to the

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Gains to be divided equally.

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Fees with clerks to be divided equally.

No clerk to be taken without the other's consent.

Disbursements and expenses to be borne equally.

If, at the end of four years, the clear profits do not amount to £——,

[A. A.] to pay a moiety of the deficieney to [B. B.] as a re-

BETWEEN TWO SOLICITORS.

turn of premium.

[*75]

said [B. B.], out of the said sum of £——, the considera- *tion money aforesaid, one half of the sum which upon such account the said profits shall be found to fall short of £——, in order to make the profits of the said [B. B.] in such joint business for the first four years of the said term equal to one moiety of the said sum of £——: And *it is hereby further covenanted and agreed upon*, by and between the said parties, that the several books of account, with a particular state of each person's account, shall, in the month of —— in each and every year during the said copartnership, or as often as it shall from circumstances be found convenient, be made up between the said parties, so that each of the said parties may be enabled to ascertain the true value of his estate and interest therein; And that in case of the death of either of the said parties, such settlement of the last general annual accounts preceding such party's decease shall be binding and conclusive to and upon the executors, administrators, and assigns of such deceased party, unless some manifest error or errors shall appear therein, exceeding the sum of £——: *And it is also hereby agreed*, that, in case either of the said parties shall die after the —— day of —— in any one year of the said term, and before the —— day of —— then next, then and in such case the business of the said copartnership shall be carried on by the surviving partner for the joint and equal benefit, and at the joint risque of such surviving partner and the representatives of the deceased partner, from the time of the decease of such partner up to the said —— day of ——, when the accounts respecting the said copartnership shall be closed in manner hereinafter mentioned: And in case either of the said parties shall die after the —— day of ——, and before the —— day of —— in any one year of the said term, that then and in such case the business of the said copartnership shall be carried on by the surviving partner for and at the joint and equal benefit and risque of such surviving partner and the representatives of the deceased partner, from the time of the decease of the deceased partner, up to the said —— day of ——, when the accounts respecting the said copartners shall be closed and settled in manner hereinafter mentioned: *And* for that purpose it is hereby agreed that the survivor of the said parties shall, after the decease of the other of them, carry on and con-

Accounts to be taken annually.

In case of the death of either, the survivor to carry on the business for the joint benefit of himself and the representatives of the deceased for a certain period, and then the affairs to be wound up.

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duct the business of the said copartnership upon and for the joint and equal account and benefit, and at the risque of himself and the representatives of the party who shall so die during the said term, from the time of the decease of such party up to the —— day of ——, or the —— day of ——, which shall first and next happen after such partner's decease (*b*); And shall also, as soon as conveniently may be after such of the said days as shall first and next happen after the party's decease, make out and state a just and true account of the joint stock and effects of the said copartnership, and of all credits, sum and sums of money due and owing to the said copartnership at the time of the decease of the said copartners, together with a particular account of each party's particular share and interest therein, and also a full and true account of all transactions in business relative to the said copartnership, which shall have been carried on from the time of the decease of such partner up to the —— day of ——, or the —— day of ——, which shall first and next happen after such partner's decease, and of all profits and losses which shall have arisen thereon, or been occasioned thereby: *And* such survivor shall take upon himself to collect and get in the debts which shall appear to be justly due and owing to the said copartnership, or upon account thereof; and therewith, and by and out of the monies and effects of or belonging to the said copartnership, shall and will pay and discharge the debts due and owing from the said copartnership, or from the said copartners on account thereof, to any person or persons whomsoever; and, from and after payment thereof, shall and will pay over and assign a moiety of the surplus of the same monies and effects which shall remain after payment of such debts, from time to time, when and as the same monies and effects so received shall amount unto the sum of £——, to the executors or administrators of the deceased partner; And such executors or administrators of such deceased partner shall, upon payment or transfer of such share or proportion of such party so dying, and of such share or

Surviving partner to collect debts, &c.

(*b*) It is better to add, in order to prevent dispute,

"without receiving any compensation for his trouble in carrying on and conducting the said business."

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proportion to which, as the representatives of such party dying, they shall be so entitled as aforesaid, of and in the said joint stock, debts, and effects, or on security for the same being given by sufficient deeds or other instruments in writing duly executed and sufficient in the law, grant, assign, and release unto the survivor of the said party, his executors or administrators, all the part, share, right, title, and interest of them the said executors or administrators, in right of the party so dying, of, in, and to the said joint estate, monies, debts, and other estates and effects (*c*): *And*, in case there shall be any deficiency in the said monies, credits, and effects of the said copartnership to pay and satisfy the debts which shall be due and owing from the said copartnership, such monies and effects, as far as the same will extend, shall go and be applied in payment of the debts of the said copartnership; and such deficiency shall be paid by the surviving partner and the representatives of the deceased partner in equal proportions: And *it is hereby also agreed*, that each of the said parties shall also be personally answerable to the other of them for any loss which may happen to the said copartnership by wilful neglect or default, but not for common errors: And *it is hereby also agreed*, that each of the said parties shall and may, at the end of each year of the said term, during the continuance of the said copartnership or joint practice, or oftener if they shall mutually agree thereupon, receive and take out of the joint stock of the said copartnership, in equal proportions, such sum and sums of money as shall remain in the hands of the bankers of the said copartnership over and above the sum of £——, so agreed to be kept up as a fund for carrying on the said business (*d*), so as such sum or sums of

Deficiency in assets to be made good in equal proportions.

Each party to be answerable to the other for losses arising from wilful default.

Each party to draw annually his proportion of monies in the bankers' hands beyond a certain sum.

(*c*) The intention of this clause probably is, that the surviving partner shall take an assignment of the deceased partner's share, he paying the value of it; but it is not very clearly expressed. It seems better to provide, in express terms, that the surviving partner shall be at liberty to take the deceased's share at a valuation; and, if he declines, that the partnership property shall be converted, and the produce divided, *ut ante*, p. 60.

(*d*) As solicitors are in the habit of having the money of clients in their hands, it seems proper to add,

"And also over and above any sum or sums of money in the

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money to be from time to time taken out of the said joint business as aforesaid be regularly and constantly entered in a book or books to be kept for that purpose, in order that all such sums may be brought to and stated in any general account to be made up between the said parties: AND *it is hereby also agreed*, that, in case the said [B. B.] shall happen to die at any time within the space of two years from the commencement of the said copartnership, and the said [A. A.] shall survive him, then and in such case the said [A. A.] shall and will allow to the executors or administrators of the said [B. B.] the sum of £——, being a moiety of the said sum of £——: *And* in case the said [A. A.] shall happen to die within the space of two years from the commencement of the said copartnership, and the said [B. B.] shall happen to survive him, then and in such case the executors or administrators of the said [A. A.] shall pay to the said [B. B.] the sum of £——, to and for his own use (*e*): AND *it is hereby also agreed*, that neither of the said parties shall, during the continuance of the said copartnership, lend or deliver by way of credit or trust any money or effects belonging to or employed in the said copartnership or joint practice, to any person or persons whomsoever, without the privity or consent of the other of them first had and obtained in writing; nor shall or will, during the continuance of the said copartnership, without such consent, enter into any bond, judgment, statute, or otherwise become bound or charged as surety for any person or persons whomsoever; or do, or wilfully suffer to be done, any act, matter, or thing whatsoever, whereby the money, credits, or profits employed in or arising from the said copartnership shall or may be prejudiced, attached, seized, or incumbered. AND *it is hereby further agreed*, that whatsoever papers and books of account, which shall relate and belong *to the said general business of the said copartnership (other than

If [B. B.] die within two years, [A. A.] to allow moiety of the premium.

If [A. A.] die within two years, his representatives to make an allowance.

Neither party to lend money, &c. without the consent of the other;

or become bound as surety;

or do any act whereby the partnership may be prejudiced.

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Papers, &c. belonging to the partnership to become the pro-

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hands of the said bankers on account of the said copartnership, belonging to any client or clients of the said copartnership, or other person or persons."

(*e*) As to the rule that obtains in these cases in the absence of stipulation, *vide ante*, p. 46.

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perty of the surviving partner.

and except the particular manuscripts or precedents of either of the said parties, now in their possession, or which shall have been, or shall be hereafter, collected or transcribed for his or their particular use), shall, in case of the death of either of the said parties during the said term of twenty-one years, go to and be retained by the survivor of them: But in that case, the personal representatives of the party so dying shall be at liberty, at any time within the space of twelve months next after such party's death, to take an inventory of such papers and books in and materially relating to the said business, and shall be assisted therein by the surviving partner: And two copies of such inventory shall be made and signed by the surviving partner and representatives of the deceased partner, of which inventory each of them shall have one part: And the surviving partner shall sign and give an undertaking for the safe custody of the papers and books specified in such inventory, and to produce the same at the request of the said representatives of the deceased partner. AND *it is hereby further agreed*, that, on the expiration or other sooner determination of the said copartnership, in the life-time of both of the said copartners, the said deeds, papers, and manuscripts, of or belonging to the clients of the said copartners, shall be retained by or delivered to each of the said parties, in manner following, (that is to say), such of them as belong to the present clients of the said [A. A.], or any future clients of the said copartnership, whose business shall have been and may be fairly considered as being brought into the said copartnership through the personal interest or connection of the said [A. A.], shall be retained by the said [A. A.], unless any of the said clients expressly desire that the same may be retained by or delivered over to the said [B. B.], in which case the same shall be delivered to and retained by the said [B. B.]: And the deeds, papers, and manuscripts of such of the clients of the said copartnership, whose business shall have been and may be fairly considered as brought into the said copartnership through the personal interest or connection of the said [B. B.], shall be retained by or delivered to the said [B. B.], unless any such clients *expressly desire that the same may be retained or delivered over to the said [A. A.]; in which

Inventory of papers to be taken.

Division of papers between the partners at the expiration of the partnership term.

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case the same shall be delivered to and retained by the said [A. A.]; And such of the said deeds, papers, and manuscripts, as belong to any of the clients of the said copartnership, who do not come within either of the descriptions aforesaid, the same shall remain with and be retained by the said [A. A.]: And *it is hereby further covenanted, concluded, and agreed upon,* by and between the said parties to these presents, and each of them for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the other of them, his executors, administrators, and assigns, that if at any time during the continuance of the said copartnership, any controversy, doubt, or question, shall arise or happen between the said parties, touching the said copartnership or joint practice, or any covenant, clause, or agreement, herein contained, the same shall be resolved and determined by three disinterested persons, one to be nominated by each of the said copartners respectively, and the third by the two first so nominated: And that the award, order, or determination of the said referees, or any two of them, shall be binding and conclusive, without any further controversy, suit, or dispute whatsoever. And the said [B. B.], for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said [A. A.], his executors, administrators, and assigns, That he the said [B. B.] shall and will well and truly pay unto the said [A. A.] the said sum of £—— on the said —— day of —— now next ensuing, according to the true intent and meaning of these presents; and also shall and will, on or before the said —— day of ——, pay, or to the satisfaction of the said [A. A.] secure to be paid (*f*), unto the said [A. A.] the further sum of £—— on or before the expiration of the first four years of the said copartnership, with interest for the same after the rate of *5l. per centum per annum;* such interest to be paid and payable by equal half-yearly payments, to be computed from the commencement of the said copartnership. Provided always, *and it is hereby mutually and fully declared and agreed* by and between the

BETWEEN TWO SOLICITORS.

Disputes to be referred to arbitration.

Covenant by [B. B.] to pay and secure consideration money by instalments.

(*f*) This is too indefinite, the nature of the security should be specified.

BETWEEN TWO SOLICITORS.

Power to [A.A.] to determine the partnership in case he shall be desirous of retiring from practice.

said parties to these presents, That in case the said [A. A.] shall at any time after the end and expiration of the first seven years of the said term of twenty-one years, be minded and desirous to retire from, and relinquish and give up the business or practice of an attorney and solicitor, and his share of the profits of the said copartnership in the same business or profession, unto the said [B. B.], And, for that purpose, shall give to the said [B. B.] twelve calendar months' previous notice, in writing, of such his mind and intention; Then, and in such case, these present articles, and every thing herein contained, shall cease, determine, and be utterly void: And then, and in such case, and so soon as conveniently may be after the time when the said [A. A.] shall relinquish and give up the same business or practice, and his share of the profits of the said copartnership or joint practice, they, the said parties, shall make out, state, and settle, a just and true account of the joint stock and effects of the said copartnership, at the time of such dissolution of the same copartnership, in such and the same manner as is hereinbefore agreed upon and directed, in the event of either of the said parties dying during the continuance of the said copartnership: And the said [B. B.] shall take upon himself to collect and get in the debts which shall appear to be justly due and owing to the said copartnership, or upon account thereof, and therewith and thereout, and by and out of the monies and effects of and belonging to the said copartnership, shall and will pay and discharge the debts due and owing from the said copartners on account thereof to any person or persons whomsoever; And, from and after payment thereof, shall and will pay over and assign one moiety of the surplus of the same monies and effects which shall remain, after payment of such debts, from time to time, when and as the same monies and effects so received shall amount unto the sum of 100*l.*, to the said [A. A.], his executors or administrators; And the said [A. A.], his executors or administrators, shall, upon payment or transfer of such share or proportion of and in the said joint stock, debts, and effects, or security for the same *being given, by sufficient deeds or other instruments in writing, duly executed and sufficient in the law, grant, assign, and release unto the said [B. B.], his executors or

Accounts to be made up.

[B. B.] to collect in the debts, &c., and affairs to be wound up in the same manner as in the case of death.

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BETWEEN TWO SOLICITORS.

administrators, all the part, share, right, title, and interest of him the said [A. A.], his executors or administrators, of, in, and to the said joint stock, monies, credits, and other estate and effects; And in case there shall be any deficiency in the said monies, credits, and effects of the said copartnership, to pay and satisfy the debts which shall be due and owing from the said copartnership, such monies and effects, so far as the same will extend, shall go and be applied in payment of the debts of the said copartnership; and such deficiency shall be paid by the said [A. A.] and [B. B.], in equal proportions. PROVIDED ALWAYS, *and it is hereby expressly declared and agreed* by and between the said parties to these presents, That, in case the said [A. A.] shall give such notice as lastly hereinbefore mentioned, and such dissolution of the said copartnership shall take place in consequence thereof, he the said [A. A.] shall not nor will, at any time thereafter, re-assume or take upon himself the practice or employment of an attorney or solicitor, in all or any of the branches of law, equity, or conveyancing hereinbefore mentioned, but shall and will absolutely and *bonâ fide* retire from and give up such business; and shall and will, from time to time, and at all times thereafter, use his best and utmost endeavours to promote the interest of the said [B. B.] in the said business or profession, and to continue the clients of the said copartnership to the said [B. B.]: And that he the said [A. A.] shall not, nor will, by any means whatsoever, attempt to prevail on any of the clients of the said copartnership to withdraw their business or concerns from the said [B. B.], or to employ any other attorney or solicitor in prejudice to the said [B. B.]; but, on the contrary, shall and will in all things endeavour to promote and advance the business and advantage of the said [B. B.] in the business or profession of an attorney and solicitor, so far as it is in the power of the said [A. A.], and as he can be reasonably and properly required to do. PROVIDED ALSO, *and it is hereby further agreed,* that in case such dissolution of the said copartnership, as lastly hereinbefore *mentioned, shall take place, all and every the papers, books, and writings, which shall relate or belong to the general business of the said copartnership, shall be retained by the said [A. A.], he the said [A. A.] indemnifying the said

If there be such dissolution [A. A.] not to practise as a solicitor.

And use his utmost endeavours to promote the interest of [B. B.]

In case [A. A.] dissolves the partnership, papers to be delivered to [B. B.]

[*83]

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[B. B.], his executors and administrators, of, from, and against all damages, costs, and charges which he the said [A. A.], his executors or administrators, may sustain or be put unto, for or by reason of his, the said [A. A.'s], delivering up or permitting the said [B. B.] to retain the said papers, books, and writings as aforesaid. AND LASTLY, each of them the said [A. A.] and [B. B.], parties to these presents, doth hereby bind himself, his heirs, executors, and administrators, unto the other of them, his executors, administrators, and assigns, in the penal sum of £—— of lawful money of Great Britain, for the due performance of all and every the covenants, articles, and agreements hereinbefore contained, which by them respectively are and ought to be observed, performed, and kept according to the true intent and meaning of these presents (*g*). IN WITNESS, &c.

As to the efficiency of clauses imposing the payment of "*liquidated damages.*"

(*g*) It is very common in partnership-deeds to insert a stipulation, that, on the breach of any of the covenants, the offending party shall pay to the other a specific sum of money, by way of liquidated damages†: and undoubtedly such provisions, where they are efficient, are very useful in regard to some species of covenants, the non-performance of which is likely to be attended with an extent of injury not easily ascertainable, or capable of proof, and for which, therefore, adequate damages could not be recovered in a Court of law. Of this kind, obviously, is the covenant not to set up business within a certain local distance for a given period of time after the dissolution of the partnership, and many others that might be named; in such cases a clause, fixing the damages ought always to be, and usually is, added. But a *general* clause, directing the payment of a specific sum, by way of liquidated damages, on the breach of any one of a series of covenants, is now established to be nugatory, more especially where any of the covenants to which it relates are for the performance of acts of a nature which does not admit of the compensation being conventionally assessed at that sum, the breach being evidently attended with an ascertained damage of a different amount, as in the case of a covenant to pay money. Thus, where *the defendant F., by an agreement in writing, entered into with the plaintiff K., agreed to act as a principal comedian at the Theatre-Royal Covent Garden, during the four then next seasons, commencing October, 1828; and also to conform in all things to the usual regulations of the said Theatre-Royal Covent Garden; and K. agreed to

[*84]
Case of *Kemble* v. *Farren.*

† *Vide* cases *ante*, Vol. 3, p. 441.

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pay him 3*l.* 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances during the next four seasons; and that F. should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that, if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1000*l.*; to which sum, it was thereby agreed, that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof. The breach alleged in the declaration was, that the defendant refused to act during the second season; for which breach the jury, upon the trial, assessed the damages at 750*l.*; which damages the plaintiff now moved the Court to increase to 1000*l.*, contending that they ought, by the terms of the agreement, to have been assessed at that sum. Lord C. J. *Tindal*—"It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in this agreement, the same declaring, not only affirmatively, that the sum of 1000*l.* should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at 1000*l.*; for we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of 3*l.* 6*s.* 8*d.* *per* day; or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended, that the clause in question, *in either case, would have given the stipulated damages of 1000*l.* But [*85] that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which Courts of equity have always relieved, and against which Courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy by the verdict of a jury. But we can only say, if such is the in-

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tention of the parties, they have not expressed it, but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case in principle from that of *Astley* v. *Weldon*"†. *Kemble* v. *Farren*, 6 Bing. 141; *S. C.* 3 Moore & Pay. 425.

If the position advanced by Lord *Tenterden*, in the case of *Randal* v. *Everest*, 1 Moody & Malkin, 41, (*ante*, Vol. 3, p. 445 *a*, 2nd edition), can be sustained, the preceding case might have been disposed of upon quite a different ground; namely, that the instrument being not under seal, liquidated damages could not, under any clause or expressions whatever, be recovered. Nothing can be more unqualified than his Lordship's declaration upon the subject:—"Whatever language," said he "the parties may choose to use, I am of opinion, in point of law, that a jury cannot be called upon to give more damages than the party has really sustained. *I confine my opinion to contracts not under seal.* Instruments in that form may, perhaps, receive a different construction." This case was cited to the Court in *Kemble* v. *Farren*, but is not alluded to by the Lord Chief Justice in his very perspicuous judgment. Probably he did not consider it necessary to notice a *Nisi Prius* decision upon such a point. Indeed, it has been often a subject of regret that such decisions are reported; and every person who is in the habit of examining them, will join in that regret. The hasty impressions of a judge, however able, delivered in the hurry of business at the Assizes, it is submitted, ought not to be allowed to mingle themselves with the well-considered adjudications of the Courts, as part of the law of the land.

A subsequent case has carried the doctrine under consideration a step still farther, deciding that a provision assigning the same measure of liquidated damages for the breach of any one of a series of covenants of different degrees of importance is to be regarded as imposing a penalty only, even though none of the covenants be for the payment of money.

[*86]

Sum recoverable on breach of any one of several covenants held to be a penalty.

Thus, where A., having been sued for damages occasioned by his breaking up a highway, in the month of December, 1828, gave a *cognovit* for 200*l.*, with a defeasance, in which it was provided that execution should not be sued out if A. paid the plaintiff his costs, and the road were reinstated to the satisfaction of S., a surveyor, by the 15th day of April. A. paid the plaintiff's costs, but the road was not re-instated to S.'s satisfaction till the middle of June, and the plaintiff sued out execution for the 200*l.* on the 4th of May. The defeasance was as follows:—That if defendant should pay to plaintiff his costs, and reinstate the road to the satisfaction of S. by the 15th of April, 1829, (according to various minute stipulations therein set forth,) it was thereby agreed that the defendant, from time to time, and at all times, duly and properly fulfilling all and every the articles, agreements, and stipulations aforesaid, no judgment

† Vide this case, *ante*, Vol. 3, p. 447.

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should be entered up, nor execution thereon be issued, for the damages, costs, charges, and expenses aforesaid, or any part thereof; but in case default should at any time be made in performance of any one or more of the said several articles, agreements, and stipulations thereinbefore contained on the part of defendant, the said plaintiff was to be at full liberty forthwith to enter up judgment for the said damages, costs, charges, and expenses, and to issue one or more writ or writs of execution on the said judgment for the said damages, costs, charges, and expenses, or so much thereof as might then remain unpaid. A rule *nisi* had been obtained for setting aside the execution, on affidavits stating the above circumstances, and alleging that the making the road at the stipulated time was impracticable. The Court, after *argument, made the rule absolute. *Tindal*, C. J.—"We do not say that a *cognovit* may not be so worded as to render the sum secured by it payable in the same way as liquidated damages. But the question here is, whether we can consider this *cognovit* as any other than a security by penalty for certain work to be done by the defendant. *In the defeasance there are stipulations of various degrees of importance; and as it would be unjust to say, that, if the road were completed only one day after the term agreed on, the defendant should pay the whole* 200*l.*, *it would be equally so to say, he should pay the whole after performance of a portion of the work.* We must, therefore, refer it to the Prothonotary to ascertain what has been done; what damage, if any, the plaintiff has sustained; and how much, if any thing, ought to be paid to the plaintiff." *Charrington* v. *Laing*, 6 Bing. 242; *S. C.* 3 Moo. & Pay. 587.

[*87]

Conclusion from the cases.

The conclusion to be drawn from the reasoning of the Court in this case is, that a covenant to pay a sum of money as liquidated damages on the breach of any one of a series of stipulations must in all cases be nugatory, as the covenant necessarily embraces acts of various degrees of importance, all which cannot, with equal justice, be compensated for by the payment of the same sum. If it were sufficient in regard to some, it must be excessive as to others. The unreasonableness of such a provision formed, in the opinion of the Court, a sufficient ground for treating the sum stipulated to be paid as a penalty. The consequence is, *that, in order to give an effectual remedy for the recovery of a sum of money as stipulated damages, in such a case, a distinct and separate amount should be assessed as the measure of compensation on the breach of each several covenant.*

The frequent failure of attempts to establish claims to liquidated damages might seem almost to warrant a doubt whether the Courts would in any instance give effect to covenants for the payment of them, did not cases sometimes occur, in which such damages are recovered. Such is *Jones* v. *Green*, 3 You. & Jerv. 298, where an annual sum of 10*l.* an acre, which was by a lease made payable in case the tenant in the last

BETWEEN TWO SOLICITORS.

three years of the term should sow more than a certain quantity of land with clover in any one year, was treated as an additional rent and not as a penalty. On which ground the lessee's plea to a bill in equity for a discovery was overruled.

BETWEEN TWO MANUFACTURERS.

DEED *of* PARTNERSHIP *between two* MANUFACTURERS, *where* EACH *is engaged separately in* OTHER BUSINESSES. CAPITAL *not to be* DIMINISHED, *but Losses to be* MADE GOOD *by* PARTNERS, *out of their* SEPARATE ESTATES. *On the* DECEASE *of either* PARTNER, *his* CAPITAL *to be* LENT *to the* SURVIVING PARTNER *and any new Partner whom he may take, until the* END *of the* PARTNERSHIP TERM.

Parties.

THIS INDENTURE, made &c., BETWEEN [A. B.], of &c., of the one part; and [C. D.], of &c., of the other part; [*88] *Testatum.* WITNESSETH, that the said parties to these presents, *for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, do covenant and agree, each of them with the other of them, his executors and administrators, mutually and reciprocally, by these presents—

Mutual covenant—

To become partners.

I. (*a*) THAT they the said parties will become and remain partners together in the trade or business of manufacturers of ——, upon the terms and conditions hereinafter expressed.

Commencement and duration of partnership.

II. THAT the partnership shall commence from the — day of ——, and shall continue for the term of —— years thenceforth next ensuing, if both the said parties shall so long live, and shall be carried on at —— aforesaid, under the firm of [*name of firm*].

Partners may engage in other trades.

III. THAT this partnership shall not extend to or affect any other trades or businesses now carried on by the said parties respectively, at —— aforesaid, or any trade or concern

(*a*) A numerical arrangement of the clauses is often convenient for the purposes of reference.

BETWEEN TWO MANUFACTURERS.

whatever, now or hereafter to be carried on by the said parties respectively, either alone or in partnership with any other person or persons, at any place or places, other than the trade of manufacturers of ——, at —— aforesaid, or elsewhere.

Mill, steam-engine, &c., to be deemed partnership property.

IV. That the said joint business shall be carried on at the mill and premises (*b*), situate at —— aforesaid, called the ——; which mill and premises, together with the ground belonging to the same, and the steam-engine, erections and machinery thereon, and which are the joint property of the said parties, together with the present stock in trade, shall be considered and estimated as of the value of £——, and as advanced and brought into the said business by the said parties, in equal moieties, and shall form part of the capital to be employed for the purposes of the said trade: And that each party shall advance such further sum or sums of money as capital, to be used and employed for the purposes of the said joint business, during the partnership.

[*89]

Capital not to be withdrawn.

V. That the capital brought in and to be advanced and brought in as aforesaid, shall be used and employed in the regular course of trade, for the benefit of this partnership, and shall not be drawn out during the continuance of such partnership, without the mutual consent of both the said parties.

Neither party to be obliged to attend to the business.

VI. That neither of the said parties, during this partnership, shall be obliged to be resident in ——, or to take any greater share in the management and conduct of the said joint trade, than shall be convenient or agreeable to himself; but that both the said parties shall conduct the said business, so far as they respectively shall be engaged therein, to the best of their skill, judgment, and ability.

Proper books of account to be kept, and each party to have access thereto.

VII. That proper books of account, and other books, shall be kept, in which fair, plain, and perfect entries shall, from time to time, be made of all the monies, goods, or effects, belonging or relating to this partnership, which shall be received, paid, sold, or contracted for: And also, of all

(*b*) No word has been more diverted from its original signification than this. It properly imports what has gone before, but is commonly used, as in this instance, to designate property of the nature of real estate, as houses, land, &c., though not antecedently described.

BETWEEN TWO MANUFACTURERS.

debts due and owing to and from this partnership; and of all such other matters as are usually entered in books of account kept by traders; with all such circumstances as may in anywise shew the true situation and proceedings of this partnership, and the business thereof; and that all such books of account and other books, and also all writings concerning the affairs of this partnership, shall, at all times, be kept in the counting-house belonging thereto: And that each of the said parties shall at all times have full access to inspect or copy the same, or any part thereof, at his pleasure, without any hindrance by the other of them.

Neither partner to give credit, &c. after notice from the other not to do so, nor compound debts.

VIII. That neither of the said parties shall sell or deliver, by way of credit, loan, or trust, any of the goods or effects belonging to this partnership, to any person or persons whom the other of them shall forewarn him not to credit or trust; nor shall either of the said parties borrow or take up any money whatsoever on account of this partnership, or lend any of the monies belonging thereto to any person or persons, or compound any debt or debts which shall be due to this partnership, without the consent of the other of them; And that each of the said parties shall be accountable for, and shall make good unto *this partnership, the whole of such debts and monies as he, or any other person by his order or authority, shall receive or give any receipt for; And that the said parties shall and will be true and just to each other in all their transactions in and relative to the concerns of this partnership, and from time to time give to each other a true account thereof (*c*).

[*90]

Not to do any act by which the partnership property may be taken in execution.

IX. That neither of the said parties shall, during this partnership, do or suffer to be done any act, matter, or thing, whereby the capital stock of this partnership, or the gains and profits thereof, or any of the effects belonging thereto, may be seized or taken in execution; And that each of the said parties, his heirs, executors, or administrators, shall and will at all times hereafter keep harmless and indemnified the other of them, his heirs, executors, and ad-

(*c*) This and some of the other usual clauses are expressed in this precedent with more than ordinary brevity; provisions which are almost of course, and do little towards explaining the real objects of the parties, cannot be too short.

ministrators, and the stock of this partnership, and the gains and profits thereof, from and against his respective debts and engagements not concerning this partnership, and from all costs, damages, and expenses on account thereof.

No assistant to be taken or discharged without consent.

X. That neither of the said partners shall take any assistant in the said joint trade, or discharge any assistant therefrom, or furnish or sell any goods, his own private property to the said partnership, without the consent of the other of the said parties.

Expenses and losses to be paid out of profits, and, in case of their being deficient, out of the separate estates of the partners.

XI. That all rent, taxes, services, and outgoings, payable by the said partners in respect of the said joint trade, and also all salaries of assistants, and all other necessary expenses whatsoever, which shall be incurred in or about the said joint trade or business, or relating thereto, and all debts and duties which shall be owing by reason or on account of the said joint trade, and any loss or damage which shall happen thereto by bad debts, decay of goods, suits at law or in equity, or otherwise, shall be paid or borne by or out of the gains and profits of the said joint trade, if the same shall be sufficient for that purpose; and if not, then, as to the deficiency, by the said parties out of *their own [*91] private estates, in equal proportions, to the end that the capital stock of the said partnership may not be impaired or diminished.

Profits, how to be divided.

XII. That the profits of the said joint trade (after payment of all such expenses and outgoings as aforesaid), shall be divided between the said partners in manner following, (that is to say): In the first place, an allowance, after the rate of *5l. per cent. per annum*, shall be made to each of the said parties upon and in respect of the capital by him advanced for the purposes of the said joint trade, estimating his share of the said sum of £—— as part of such capital; and the remaining clear profits thereof shall belong to the said parties in equal proportions.

Annual accounts to be taken.

XIII. That, on the —— day of —— in every year, during this partnership, or within —— calendar months next after that day, a full and general account in writing shall be made and taken of all and singular the stock in trade, monies, credits, and things belonging, due, or owing to the said parnership, and of all debts due or owing from the same, and of all such other matters and things as are usually

BETWEEN TWO MANUFACTURERS.

comprehended in annual documents of the same nature taken by traders: And a just valuation and appraisement shall be made by the said parties of all such particulars included in such accounts as can or may be appraised; which said general account, valuation, and appraisement, or a sufficient abstract thereof referring to the particulars in the ordinary books of this partnership, shall be thereupon entered in two books, and be subscribed in each book by each of the said parties; and, after such subscription, each of the said parties shall take one of the said books into his own custody; and thenceforth each of them shall be bound and concluded by every such account respectively, unless some manifest error shall be discovered therein within three calendar months then next, to the amount or value of £—— at the least, and be signified by one of the said parties to the other of them; in which case only such error shall be rectified: And immediately after the closing of every such annual account, the clear profits of the said joint business shall be divided between the said parties in equal proportions (*d*).

And a valuation made.

And profits divided.

[*92]

Final settlement of accounts at the dissolution.

XIV. That, at the end, or expiration, or determination of this partnership, a final settlement of accounts in writing shall be forthwith made by and between the said parties, if living, or if either of them shall be dead, then between the surviving party, and the executors or administrators of the deceased party, of and concerning all the stock in trade, monies, credits, and effects then due, owing, or belonging to the said joint trade; and also of and concerning all debts

(*d*) It is usual, in partnership deeds, to provide for the division of the profits on the making up of the annual accounts; but it is obvious that the financial situation of the partnership may not admit of so large a draught being made upon its funds. It, therefore, seems proper to add a clause to this effect:—

Profits how to be drawn out.

"Which respective shares of profits, when so ascertained, shall be drawn by the said respective partners out of the funds of the said partnership, from time to time, as their exigencies shall require; but so, nevertheless, that not less than the sum of £—— shall at any one time be left in the hands of the bankers of the said partnership, applicable to the purposes thereof."

and sums of money due and owing from the same; which debts and sums of money due and owing from the said joint trade shall forthwith be paid and discharged, (or a sufficient sum or amount be set apart for the due and speedy payment and discharge thereof), by and out of the gains and profits of the said joint trade then remaining undivided, if sufficient for that purpose; and if not, then, as to the deficiency, by the said parties, or their respective executors or administrators, out of their own private estates, in equal proportions; and in case any profits of the said joint trade shall, after paying or providing for the payment of such debts in manner aforesaid, remain divisible, the same shall be thereupon divided in manner, and subject to the deductions and allowances, aforesaid. *Provided always*, nevertheless, that in case the determination of this partnership shall happen by the death of either of the said partners prior to the expiration of the said term of —— years, then and in such case a settlement of accounts shall be made as aforesaid; and after payment to the executors of the deceased party of his share of the clear profits (if any) to the time of his decease, the share of capital of such deceased party shall, if the *surviving partner require it, be continued in the business for the then residue of the said term, such business to be thenceforward carried on for the benefit of such surviving party alone, or for the benefit of himself and any new partner or partners he may take, to the end of the said term; such surviving partner, if the business shall be carried on by him alone, or he and such new partner or new partners, if he shall take any such (*e*), entering into a bond in a sufficient penalty for due payment to the executors, administrators, or assigns of such deceased partner, of the amount of the capital share of such deceased partner, at the end of the said term, with interest for the same in the mean time after the rate of 5*l. per cent. per annum*, payable half yearly, the first payment to be made at the end of six calendar months next after the decease of such dying partner, and for indem-

BETWEEN TWO MANUFACTURERS.

In case of the death of either partner, his share of the capital to be lent to the surviving partner, and any partner he may take.

[*93]

(*e*) If with the addition of a surety, say—

"with a surety, to be approved of by the executors or administrators of the deceased partner,"

BETWEEN TWO MANUFACTURERS.

nifying the estate and effects of the deceased partner against the debts and demands due or owing by or from the said partnership (*f*). IN WITNESS, &c.

(*f*) Sometimes it may be prudent to add a clause to this effect:—

Disputes respecting sureties to be referred.

"And in case any dispute shall arise respecting the acceptance or approval by the executors or administrators of the deceased partner of any person proposed as surety by the surviving partner in the bond to be given by him as aforesaid, then it shall be referred to [A.] to declare whether such person ought to be accepted; and if [A.] shall be then dead, or shall decline to interfere therein, such reference shall be made to [B.]; and the opinion expressed by the said [A.] or [B.], (as the case may be), on the point so referred to him, shall be conclusive on the said parties."

[94]

BETWEEN PATENTEE AND ANOTHER.

DEED *of* PARTNERSHIP *between two Persons in the Business of* MANUFACTURING *and* VENDING *a* MACHINE, *for which one has obtained a* PATENT: *The other to* CONTRIBUTE *the* CAPITAL: POWER *to either Partner to* DISSOLVE *the* PARTNERSHIP *on* BREACH *of* COVENANT *by the other:* OPTION *to* EXECUTORS *or* ADMINISTRATORS *of a* DECEASED PARTNER *to* SUCCEED *to his* SHARE, *but not to interfere in the Management: If they decline, the* SHARE *to be* TAKEN *by surviving Partner at a* VALUATION. *With usual Clauses, somewhat varied from those of the former Precedents. (A short Form).*

Parties.

THIS INDENTURE, made &c., BETWEEN [A. B.], of &c., of the one part; and [C. D.], of &c., of the other part:

Recital of letters patent.

WHEREAS the said [A. B.] has obtained his Majesty's letters patent under the great seal of Great Britain, bearing date the —— day of this present month of ——, whereby the

BETWEEN PATENTEE AND ANOTHER.

exclusive right and privilege of manufacturing a certain machine, invented by the said [A. B.], intituled, ["——"] has been granted to him, his executors, administrators, and assigns, for the term of —— years from the date thereof: AND WHEREAS the said [A. B.] and [C. D.] have agreed to become partners together in the business of manufacturing and vending the said machines for the term of the said patent right, conformably to the covenants and provisions hereinafter contained: AND WHEREAS the said [A. B.] and [C. D.] have defrayed the expenses of obtaining the said letters patent in equal moieties: NOW THIS INDENTURE WITNESSETH, that each of them the said [A. B.] and [C. D.], for himself, his heirs, executors, and administrators, hereby covenants *with the other of them, and the executors and administrators of the other of them, mutually and reciprocally, in manner following, (namely):—

Of agreement to become partners.

Testatum.

Mutual covenant.

[*95]

I. THAT the said [A. B.] and [C. D.] shall be partners together in the business of manufacturing and vending the said machines pursuant to the said letters patent, for the said term of —— years, granted by the said letters patent; and that such business shall be carried on under the firm of [B. and D.], at —— aforesaid, or at such other place or places as the said partners shall mutually agree upon.

Business and duration of partnership.

II. THAT the said patent right shall be considered as part of the joint property of the said partnership; and that no share, right, or interest therein or thereto shall be sold, granted, assigned, or disposed of to any person or persons, without the consent of both the said partners; and that all monies, benefit, and advantage to accrue from the sale, grant, assignment, or disposition of any such share or interest shall be divisible between the said partners in the same proportions as the profits of the said business are hereinafter directed to be divided.

Patent to be joint property.

III. THAT the said [C. D.] shall immediately advance and bring into the said business the sum of £——, and shall continue to employ the same in carrying on the said business, and for the benefit of the said partnership, during the said term of —— years, without any allowance of interest for the same; and shall, from time to time, at the request of the said [A. B.], advance and bring into the said business such further sum and sums of money (not exceeding, together

Capital to be advanced by one of the partners.

BETWEEN PATENTEE AND ANOTHER.

with the said sum of £——, the total sum of £——), as shall be required to be used and employed as capital in carrying on the same business, being allowed interest on such further advances after the rate of *5l. per cent. per annum* out of the profits of the said business, before any division of such profits: and that the said [C. D.] shall not withdraw such further advances, or any part thereof, without the consent in writing of the said [A. B.] first obtained for that purpose.

No apprentice &c. to be taken by either, without the consent of the other.

[*96]

IV. THAT no agent, apprentice, clerk, or servant shall be engaged or employed in or about the said business, by either of the said partners, without the consent of the *other of them: and that all premiums and fees to be received with apprentices or others, taken, employed, or instructed by either of the said partners in the said business, shall be divisible as part of the profits of the said partnership.

Division of profits.

V. THAT the clear gains and profits of the said partnership, (after paying thereout the rent and taxes to become payable in respect of any buildings, workshops, or premises where the said business shall be carried on, and the wages of clerks, workmen, and servants, the expenses of travelling, and all other outgoings incident to the carrying on of the said partnership business; and after deducting the interest hereinbefore agreed to be allowed to the said [C. D.] on his further advances of capital,) shall, during the first seven years of the said term of —— years, be divided into three equal shares, whereof two shall belong to and be taken by the said [A. B.], and the other by the said [C. D.]; and shall, during the remainder of the said term, be divided between the said parties in equal moieties.

During first seven years.

Remainder of term.

Losses to be borne in moieties.

VI. THAT all the losses to be sustained or incurred by the said partners, or either of them, in or about the carrying on of the said partnership business, shall be borne by the said partners out of their own proper monies, in equal moieties.

Sums to be drawn monthly.

VII. THAT it shall be lawful for each of them the said partners to draw out of the said business any sum or sums not exceeding £—— *per* month, to be accounted for on the next division of profits.

Monies, &c. to be paid to bankers.

VIII. THAT all monies, bills, notes, and securities for monies, which shall come to the hands of the said partners, or either of them, on account of the said partnership busi-

ness, shall be paid into the hands of Messrs. ——, bankers, at —— aforesaid, or such other bankers as the said partners shall mutually agree upon, and be placed to the account of the said partnership; and that no monies shall be drawn out or paid on account of the said partnership, otherwise than by a draught or cheque upon such bankers.

Accounts to be taken and profits divided.

IX. That during the continuance of this partnership *within two calendar months after the —— day of —— in every year, the said partners shall make a proper account [*97] in writing of all the stock, credits, and other things belonging, due, and owing to the said partnership, and of all debts due or owing by or from the said partnership, and a just valuation of all particulars included in such account, which account and valuation shall, within the time aforesaid, be written in two books, to be respectively subscribed by the said partners; and, after such subscription, each partner shall take one of the said books, and be concluded thereby, unless some manifest error, to the amount of 10*l.* or upwards, shall, within the space of twelve calendar months next after the taking of such accounts, be notified by either of the said partners to the other of them, in which case only such error shall be rectified; And that upon the making up of every such yearly account, the clear profits of the said partnership business, which shall have accrued or been gained in the preceding year, shall be divided according to the proportions hereinbefore contained.

Partners to keep proper accounts.

X. That the said partners respectively shall write or cause to be written in the books of account kept for that purpose, proper entries of all monies and goods received, paid, delivered, or contracted for by them or either of them, or their apprentices or servants, and of all such other matters as ought to be entered in the regular course of the said business; And the said books of account shall be kept in a counting-house, or some other place to be appropriated for the purpose by the mutual consent of the said partners, and not elsewhere, and shall at all reasonable times be open to the inspection of the said partners.

One partner to give his whole attention, the other not.

XI. That the said [A. B.] shall at all times, during the continuance of the said partnership, diligently and faithfully employ himself in the conduct and management of the said business, and in the concerns of the said partnership,

BETWEEN PATENTEE AND ANOTHER.

unless he shall be prevented by sickness or other reasonable cause of excuse arising without his own default; but the said [C. D.] shall not be obliged to attend to the said business, unless he shall think proper so to do.

Neither partner to transact business after notice from the other not to do so, &c.

XII. That neither partner shall transact any business, or enter into any contract, after he shall be required by his *copartner not to do the same; nor shall either partner, without the consent of the other of them, compound, release, or discharge any debt or duty which shall be due or owing to the said partnership, otherwise than for so much money only as shall be brought or received into the joint trade; And that neither partner, without the consent of the other of them, shall draw or accept any bill of exchange or promissory note, or contract any debt on account of the said partnership, except in the regular course of the business of the said partnership, and for the benefit thereof; And that neither of the said partners shall assign over his share or interest in the said partnership effects, nor withdraw for his private use the whole or any part of his share of the capital stock of the said partnership, nor become bail or surety with or for any person or persons whomsoever, nor shall carry on, either separately or in partnership with any other person or persons, the trade or business of a maker or manufacturer of the said machines, or of any machines of the like nature (*a*),

[*98]

Covenant not to engage in the same or any other business, legal.

(*a*) Of course, a covenant not to engage separately in a similar business to that of the partnership, is not obnoxious to the principle of public policy, which prohibits general restraints upon trade, (as to which *vide ante*, Vol. 1, p. 172). If authority were necessary in support of so clear a proposition, we have that of Lord *Eldon*, who has observed—"In partnership engagements, a covenant that the partners shall not carry on, for their private benefit, that particular commercial concern in which they are jointly engaged, is not only permitted, but is the constant course." See *Morris* v. *Colman*, 18 Ves. 438. And even if the covenant were not so restricted, but extended, as such covenants frequently do, to every species of trade, it is conceived the objection would be equally untenable; for though the public weal may be prejudiced by a man being under an obligation wholly to abstract himself from commerce, yet the same detrimental consequence is not likely to ensue from his exertions being confined to a single pursuit. Indeed, every day's experience proves the latter to be often the most beneficial mode in which they can be employed.

or otherwise knowingly or willingly do, commit, or permit any act, matter, or thing whatsoever, by which, or by means of which, the said partnership monies or effects shall be seized, attached, extended, or taken in execution.

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XIII. That if either of the said partners shall be guilty of any breach, non-observance, or non-performance of any of the stipulations and agreements hereinbefore contained (*b*),

Power to either partner to dissolve the partnership on

The rule *expressio unius est exclusio alterius* applies to these covenants; and, therefore, if a party covenant not to be engaged in a particular business, it is to be presumed that all others were intended to be left open to him. Upon this principle, Sir *J. Leach*, V. C., was of opinion, that a covenant in the articles of partnership of the proprietors of a London morning newspaper, that they would not be concerned in any other *morning* paper, afforded the conclusion that it was the intention of the parties that they might engage in the concern of any *evening* paper. *Glassington* v. *Thwaites*, 1 Sim. & Stu. 132. But even, independently of positive contract directed to this point, the principles of a Court of equity would not permit parties united in a common undertaking to engage in another concern, which gave them an interest adverse to that undertaking; and, therefore, in the case just referred to, the Vice-Chancellor relied much upon the fact that the act of the defendants in becoming proprietors of the evening paper gave them no interest adverse to the other paper in which the plaintiff was concerned; and though the plaintiff appeared to have acquiesced in the coproprietorship complained of, his Honour granted an injunction, restraining the defendants from first publishing in their own paper any information obtained at the expense of the other. *Glassington* v. *Thwaites*, 1 Sim. & Stu. 133.

Such covenant, how construed.

[99]

(*b*) This seems to be too general; for so extensive a power as that of dissolving the partnership ought not to be exercisable, except upon a deliberate breach of some of the most essential articles of the partnership compact, such as those particularized in the last clause, and not upon the mere neglect to make an entry in the books, or some other trivial departure from the rules laid down in the previous articles for the conduct of the business, to any of which it is obvious the present clause would extend; and even in regard to the graver acts of misconduct, it seems to be proper that a definite time be fixed, within which the aggrieved partner should be obliged to avail himself of the power. With this view, the following clause should be substituted for that in the text:—

Observation upon the power to dissolve the partnership.

"That if either of the said partners shall be guilty of a breach or non-observance of any of the stipulations contained in the twelfth article hereinbefore mentioned, it shall be

Suggested qualification of the clause in the text.

BETWEEN PATENTEE AND ANOTHER.

breach of covenant by the other.

the other of the said partners, if he shall think proper, shall be at liberty to dissolve the said partnership, by giving to the partner who shall offend in any of the particulars aforesaid, or leaving in the counting-house or other place where he shall usually carry on business, notice in writing, declaring the said partnership to be dissolved and determined; and the said partnership shall from the time of giving or leaving such notice, or from any other time to be therein appointed for the purpose, absolutely cease and determine accordingly; without prejudice, nevertheless, to the remedies of the respective partners for the breach or non-performance of all or any of the covenants and agreements contained in these presents, at any time or times before the determination of the said partnership; And the partner to whom the said notice shall be given shall be considered as quitting the business for the benefit of the partner who shall give the said notice.

Executors or administrators of deceased partner to have the option of succeeding to his share.

XIV. That in case of the death of either of the said partners during the continuance of this partnership, then the executor or administrator or executors or administrators of the deceased partner shall have the option of succeeding to the part or share of such deceased partner in the said partnership business, estate, and effects, if he, she, or they shall think proper, and shall give notice of such his, her, or their intention within —— calendar months after the decease of the partner so dying to the surviving partner; and thereupon, immediately after such notice, the executor or administrator or executors or administrators of such deceased partner shall execute all such acts and deeds as shall be requisite to subject him, her, or them respectively to the same debts and demands, and to the same conditions and agreements as the party so dying was subject or liable to in respect or by reason of the said partnership; But the executor or administrator, or executors or administrators, who, under this present provision shall succeed to the share

But not to interfere with the management unless required so to do.

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lawful for the other of the said partners, if he shall think proper, within three calendar months after the same shall be discovered by or become known to him, to dissolve the said partnership," &c., *ut supra*.

or interest of a deceased partner, shall not be at liberty to intermeddle or interfere in the conduct and management of the said partnership concerns, otherwise than by inspecting the books of account belonging to the said partnership, and examining into the state of the said trade or business, for his, her, or their own information and satisfaction, or by assisting in making up and settling *the yearly general accounts [*101] in manner hereinbefore directed, unless the said executor or administrator, or executors or administrators, shall be required to take an active part in the conduct and management of the said business by the surviving partner (*c*).

(*c*) The situation of an executor in trust carrying on his testator's trade, either solely or in conjunction with surviving partners, is one of great disadvantage. His own property is liable to the engagements of the business, while the profits belong to the *cestuis que trust*, and the executor is not even allowed a compensation for his trouble; he may, indeed, if it be necessary to continue a trade, employ a person to conduct it, and his remuneration to such person would be allowed; but if the executor carries on the business himself, he cannot claim any allowance, it being impossible to distinguish this from the other duties inseparable from his character, such as collecting debts, &c., for which he is clearly not entitled to any compensation. *Burden* v. *Burden*, 1 Ves. & Bea. 170. An executor, therefore, having no beneficial interest, incurs hazard without profit. In *Wightman* v. *Tounroe*, 1 Mau. & Selw. 412, an action was brought against A., B., C., and D., for not providing money for the payment of a bill drawn for their accommodation. It appeared that C. and D. were executors of E., the deceased partner of A. and B., who continued his share of the property in the trade for the benefit of the infant daughter of E., for whom they regularly received a share of the profits, but they did not interfere in the management of the trade, nor did their names appear in it; and they took no part of the profits to their own use. It was held that their taking a share of the profits as executors or trustees for the infant rendered them personally liable as partners; and it was observed, that unless they were, no person was liable, as the infant *cestui que trust* herself was not bound.

Situation of an executor who carries on his testator's business.

The observations just made in regard to an executor in trust, of course are equally applicable to an administrator who carries on the intestate's trade.

It has been already noticed that a surviving partner carrying on the business for the benefit of himself and the representatives of a deceased partner, *under the stipulations in the articles*, cannot claim any allowance

BETWEEN PATENTEE AND ANOTHER.

In case of dissolution by death or notice, surviving or continuing partner shall purchase share at a valuation.

Lastly. THAT in case either of the said partners shall retire from the said partnership for the benefit of the other of them, pursuant to the thirteenth article hereinbefore contained, or in case either of the said partners shall die during the continuance of the said partnership, and his executors or administrators shall decline or neglect to avail themselves of the option given to them by the article lastly hereinbefore contained, then the continuing or surviving partner (as the case may be) shall, within the space of —— calendar months next thereafter, settle and adjust with the retiring partner, or the representatives of the deceased partner (as the case may be), all accounts, matters, and things relating to the said partnership; and the amount of the share of the retiring or deceased partner (as the case may be) in the credits and effects of the said partnership,

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for his trouble, (*ante*, p. 33). Where it is intended that he shall receive such an allowance, the following clause should be added:—

Compensation to surviving partner carrying on the business.

"PROVIDED ALWAYS, and it is hereby declared, that so long as such surviving partner shall carry on the said trade or business on the behalf and for the benefit of himself and the personal representatives of the deceased partner, such surviving partner shall be entitled to deduct and retain out of the profits of the said business the annual sum of £—— as a compensation for his trouble in conducting the same."

If it is intended that the executors or administrators of the deceased partner shall receive an allowance out of the trade for their trouble, and further, that such allowance shall belong to them beneficially, the following clause may be added:—

Allowance to executor for the trouble of management.

"PROVIDED NEVERTHELESS, and it is hereby declared, that in case the executor or administrator, or executors or administrators, of such partner dying as aforesaid shall take an active part in the management of the said partnership business (being required so to do by the surviving partner), he or they shall be allowed to deduct or retain the like annual sum of £—— as a compensation for his or their trouble in assisting in the management thereof, which sum shall be received by him or them for his or their own use and benefit, and not in trust for, or for the benefit of any other person or persons whomsoever."

shall be ascertained by an estimate and valuation to be made by two indifferent persons, one to be nominated by the continuing or surviving partner, and the other by the retiring partner, or the executors or administrators of the deceased partner (as the case may be), with power to choose an umpire in case of their not agreeing in their opinion; *And the continuing or surviving partner shall thereupon become the purchaser of the said share at the price or value to be ascertained as aforesaid, and enter into any bond or bonds in a sufficient penalty or penalties for securing to the retiring partner, or the representatives of the deceased partner (as the case may be), the amount of the price or value of such share, by equal instalments, with interest at the rate of *5l. per cent. per annum*, at the respective periods of six, twelve, and eighteen calendar months next after either of the said partners shall retire or die as aforesaid; and also a bond or bonds for indemnifying the estate and effects of the retiring or deceased partner (as the case may be) against the debts and demands due or owing by or from the said partnership, on having a proper assignment or assurance, or assignments or assurances, executed for vesting in the continuing or surviving partner, (as the case may be), and enabling such continuing or surviving partner to collect and get in all credits and effects due, owing, and belonging to the said partnership (*d*). In witness, &c.

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(*d*) This clause is distinguishable from that given *ante*, p. 42, where the surviving partner had an *option* to purchase the share, being at liberty to decline it if he thought proper. Here it is imperative on him. It is not usual, nor in general does it seem advisable, to *oblige* the surviving partner to purchase: but if such be the intention, it should be unequivocally expressed; for this purpose the following addition might be made to the clause in the text:—

"And it is hereby declared that this present clause shall be construed to oblige the continuing or surviving partner to purchase the share of the deceased or retiring partner as aforesaid, on the terms aforesaid, and not merely to give him the choice or option of purchasing the same."

As to making it obligatory on the surviving partner to purchase.

Perhaps it may be advisable, in order to exclude all ambiguity upon the point, to add:—

"And it is declared, that for all the purposes hereinbefore

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DEED *of* PARTNERSHIP *between* TOWN *and* COUNTRY BANKERS, CONSOLIDATING *their* RESPECTIVE FIRMS. LEASES, FIXTURES, *&c. to be* TAKEN *at a* VALUATION. *Provisions respecting the* MANAGEMENT *of the* BUSINESS *at the* SEVERAL ESTABLISHMENTS: VOICE *of the* MAJORITY *in* REGULATIONS *of* BUSINESS *to bind the whole: Special Power to* DETERMINE *the Partnership on various* ACTS *or* DEFAULTS *by any Partner or Partners, or in case of* LUNACY: AUTHORITY *to insert* NOTICE *of* DISSOLUTION *in the* LONDON GAZETTE: *Also* POWER *to* PARTNERS *respectively to* WITHDRAW *from the Partnership on* CERTAIN TERMS: *Special Arrangements for* WINDING *up the* AFFAIRS *and* DISPOSING *of the* PROPERTY *on a* DISSOLUTION; *and some general* CLAUSES *adapted to a* BANKING PARTNERSHIP: *Special Agreement to refer* DISPUTES *to* ARBITRATION.

THIS INDENTURE (*a*), made the —— day of ——, 18—, BETWEEN [A.], of &c., in the city of London,

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mentioned, an executrix or administratrix shall be deemed to be comprised within the term executors or administrators respectively hereinbefore used."

(*a*) Banking partnerships are under certain statutory restrictions, various acts of Parliament* having been passed for the purpose of confining the

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* 6 Ann. c. 22; 7 Ann. c. 7; 3 Geo. 1, c. 8; 15 Geo. 2, c. 13; 21 Geo. 3, c. 60; 39 & 40 Geo. 3, c. 28. And see 1 Stark. 459; 3 Barn. & Ald. 1; 5 Id. 204; 5 Taunt. 792.

banker, of the first part; [B.], of the same place, banker, of the second part; [C.], of ——, in the said city,

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privilege of banking, as a body corporate, to the Bank of England, and which declared it to be unlawful for any other body politic or corporate, or any number of persons exceeding six, in England, acting in copartnership, to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months. But this restriction has been considerably modified by a recent statute, (7 Geo. 4, c. 46), which enacts, "That it shall and may be lawful for any bodies politic or corporate, erected for the purposes of banking, or for any number of persons united in covenants or copartnership, although such persons so united or carrying on business together shall consist of more than six in number, to carry on the trade or business of bankers in England, in like manner as copartnerships of bankers consisting of not more than six persons in number may lawfully do; and for such bodies politic or corporate, or such persons so united as aforesaid, to make and issue their bills or notes at any place or places in England exceeding the distance of sixty-five miles from London, payable on demand, or otherwise, at some place or places specified upon such bills or notes, exceeding the distance of sixty-five miles from London, and not elsewhere, and to borrow, owe, or take up any sum or sums of money on their bills or notes so made and issued at any such place or places as aforesaid: Provided always, that such corporations or persons carrying on such trade or business of bankers in copartnership shall not have any house of business or establishment as bankers in London, or at any place or places not exceeding the distance of sixty-five miles from London; and that every member of any such corporation or copartnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or copartnership of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes by the corporation or copartnership, or while any sum of money on any bills or notes is owing or unpaid, or at the time the same became due from the corporation or copartnership; any agreement, covenant, or contract to the contrary notwithstanding.

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Stat. 7 Geo. 4, c. 46.
In what cases and under what circumstances and conditions copartnerships of more than six in number may carry on business as bankers in England.

Sect. 2. Provides, "That nothing in this act contained shall extend or be construed to extend to enable or authorize any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers as aforesaid, either by any member of or per-

This act not to authorize copartnerships to issue, within sixty five miles

BETWEEN BANKERS.

banker, of the third part; [D.], of ——, in the county of ——, esquire, of the fourth part; [E.], of &c., of the

from London, any bills payable on demand; nor to draw bills upon any partner, &c. resident within such limits, for less than 50*l.*;

son belonging to any such corporation or copartnership, or by any agent or agents, or any other person or persons on behalf of any such coporation or copartnership, to issue or re-issue in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill or note of such corporation or copartnership which shall be payable to bearer on demand, or any bank post bill; nor to draw upon any partner or agent, or other person or persons who may be resident in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill of exchange which shall be payable on demand, or which shall be for a less amount than fifty pounds: Provided also, that it

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shall be lawful, notwithstanding any thing herein or in the said recited act contained, for any such corporation or copartnership to draw any bill of exchange for any sum of money amounting to the sum of fifty pounds or upwards, payable either in London or elsewhere, at any period after date or after sight.

nor to borrow money or take up or issue bills of exchange, contrary to recited act, except as herein provided.

Sect. 3. "That nothing in this act contained shall extend or be construed to extend to enable or authorize any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers in England as aforesaid, or any member, agent or agents of any such corporation or copartnership, to borrow, owe, or take up in London, or at any place or places not exceeding the distance of sixty-five miles from London, any sum or sums of money on any bill or promissory note of any such corporation or copartnership payable on demand, or at any less time than six months from the borrowing thereof, nor to make or issue any bill or bills of exchange or promissory note or notes of such corporation or copartnership contrary to the provisions of the said recited act of the thirty-ninth and fortieth years of King George the Third, save as provided by this act in that behalf: Provided also, that nothing herein contained shall extend or be construed to extend to prevent any such corporation or copartnership, by any agent or person authorized by them, from discounting in London, or elsewhere, any bill or bills of exchange not drawn by or upon such corporation or copartnership, or by or upon any person on their behalf.

Such copartnership shall, before issuing any notes, &c. deliver at stamp office in London an account as herein mentioned.

Sect. 4. "That before any such corporation or copartnership exceeding the number of six persons, in England, shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked (A.) to this act annexed, wherein shall be set forth the true names, title, or firm of such intended or existing corporation or copartnership, and also the names and places of abode of all the mem-

fifth part; and [F.], of &c., of the sixth part: WHEREAS the said [A.], [B.], and [C.], are jointly carrying on busi- Recital that [A.], [B.], and [C.] are bankers at ——, London.

bers of such corporation, or of all the partners concerned or engaged in such copartnership*, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established or to be established by such corporation or copartnership, and also the names and places of abode of two or more persons being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as hereinafter provided, and also the name of every town and place where any of the bills or notes of such corporation or copartnership shall be issued by any such corporation, or by their agent or agents; and every such amount† or return shall be delivered to the commissioners of stamps, at the stamp office in London, who shall cause the same to be filed and kept in the said stamp office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said commissioners in that behalf; and which book or books any person or persons shall from time to time have liberty to search and inspect on payment of the sum of one shilling for every search. Fee.

† *Sic.* [107] Account to be filed, and may be inspected.

Sect. 5. Enacts, that such account shall be verified by secretary or other public officer herein mentioned.

Sect. 6. As to what matters certified copies of such returns to be evidence.

Sect. 7. Commissioners of stamps to give certified copies of affidavits, and limit fees.

Sect. 8. Provides, that account of new officers or members in the course of any year be made by such public officers, and such further accounts to be filed.

Sect. 9. "That all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons, who may be at Copartnerships to sue and be

* It is no objection to an action brought in the name of one of the public officers, that the names and places of abode of all the partners are not stated in the return to the Stamp-office. The description of the public officers, however, must be correct; but, for this purpose, it is sufficient to give their names and places of abode, and designate them as the public officers of the company, without describing what offices they hold in the corporation. *Armitage* v. *Hamer*, 3 Barn. & Adolph. 793.

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ness as bankers at ——, in the said city of London; *And* the said [C.] and [D.] are bankers, carrying on business

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sued in the name of their public officers.

any time indebted to any such copartnership carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such copartnership against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership*; and that all actions or suits, and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, shall and lawfully may be commenced, instituted, and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal defendant for and on behalf of such copartnership." This section also regulates proceedings by indictment, &c.

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Not more than one action for the recovery of one demand.

Sect. 10. "That no person or persons, or body or bodies politic or corporate, having or claiming to have any demand upon or against any such corporation or copartnership, shall bring more than one action or suit, in case the merits shall have been tried in such action or suit, in respect of such demand; and the proceedings in any action or suit, by or against any one of the public officers nominated as aforesaid for the time being of any such copartnership, may be pleaded in bar of any other action or actions, suit or suits, for the same demand, by or against any other of the public officers of such copartnership.

Decrees of a Court of equity against public officer to take effect against copartnership.

Sect. 11. "That all and every decree or decrees, order or orders, made or pronounced in any suit or proceeding in any Court of equity against any public officer of any such copartnership carrying on business under the provisions of this act, shall have the like effect and operation upon and against the property and funds of such copartnership, and upon and against the persons and property of every or any member or members thereof, as if every or any such members of such copartnership were par-

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* It has been decided, that, where the return to the Stamp-office does not shew the name of the public officers, it may be proved by evidence *aliunde*. *Edwards* v. *Buchanan*, 3 Barn. & Adolph. 788.

at [L.] aforesaid; and the said [E.] and [F.] are bankers, carrying on business at [L.], and also at [P.]: And

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That the parties

ties members† before the Court to and in any such suit or proceeding; and that it shall and may be lawful for any Court in which such order or decree shall have been made, to cause such order and decree to be enforced against every or any member of such copartnership, in like manner as if every member of such copartnership were parties before such Court to and in such suit or proceeding, and although all such members are not before the Court.

† *Sic.*

Judgments against such public officer to operate against copartnership.

Sect. 12. "That all and every judgment and judgments, decree or decrees, which shall at any time after the passing of this act be had or recovered or entered up as aforesaid, in any action, suit, or proceedings in law or equity against any public officer of any such copartnership, shall have the like effect and operation upon and against the property of such copartnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such copartnership; and that the bankruptcy, insolvency, or stopping payment of any such public officer for the time being of such copartnership, in his individual character or capacity, shall not be nor be construed to be the bankruptcy, insolvency, or stopping payment of such copartnership; and that such copartnership and every member thereof, and the capital, stock, and effects of such copartnership, and the effects of every member of such copartnership, shall in all cases, notwithstanding the bankruptcy, insolvency, or stopping payment of any such public officer, be attached and attachable, and be in all respects liable to the lawful claims and demands of the creditor and creditors of such copartnership, or of any member or members thereof, as if no such bankruptcy, insolvency, or stopping payment of such public officer of such copartnership had happened or taken place.

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Execution upon judgment may be issued against any member of the copartnership.

Sect. 13. "That execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts or engagement or engagements in which such judgment

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money of the said copartners, and shall be forthwith advanced and brought together by the said parties in the following shares and proportions (that is to say): £——, two thirds thereof by the said [A.], [B.], and [C.], in equal shares and proportions; and £——, the residue thereof, by the said [D.], [E.], and [F.], in equal shares and proportions: *And* that each of the said parties shall, at all times during the continuance of this copartnership, and at the end or other sooner determination thereof, have a several right, title, and interest in and to the lease of the said house at ——, London, and the said fixtures and other articles; *And also* the said capital or joint stock, and all the gains, profits, increase and benefit thereof, or arising by means of the said banking business, and in and to all and singular the money, credits, estate, and effects whatsoever, which, from time to time, shall be in or belong to the said copartnership, according to the shares and proportions in which the said sum of £—— is to be advanced and made up by them respectively as aforesaid, or to be replaced by them respectively as hereinafter is mentioned; *And* that the said capital or joint stock of £——, and the gains and profits to arise from the said partnership business, shall from time to time, (except as hereinafter is mentioned), be used and employed in carrying on the same business for the benefit and advantage of the said copartnership, according to their respective shares therein; *And* that any one or more of the *said copartners shall not use or employ any of the monies or effects of the said copartnership, (except the parts thereof which he or they shall be entitled to take and appropriate to his or their use, pursuant to the agreement hereinafter contained) or engage the credit of the said partners or partnership concern in any matter, transaction, or dealing whatsoever, other than and except in the regular and ordinary course of the business of a banker, and other than and except for the benefit, or on account of the said co-partnership: *And (after some special regulations as to the mode of drawing bills and notes (b) by the several firms)*, that

That each party shall have a several right in the house at London, fixtures, and capital.

That the capital, gains, and profits of the business shall be employed for the benefit of the partners according to their shares.

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That the partners shall not use the partnership money or effects, nor engage the credit of the concern, except in the regular course of business.

That all securities shall be in the names of

(b) If the partnership be simply of a country bank, say—

Variation where the partnership is of a country bank merely.

"That an account shall be opened and a correspondence established and continued in London at the banking house of

all bonds, specialties, and securities which from time to time during the continuance of this copartnership shall be taken for and on account of the said copartnership, shall be taken in the names of three at least of the said copartners for the time being; *And* that the name of one of them the said [A.] and [B.], the name of one of them the said [C.] and [D.], and the name of one of them the said [E.] and [F.], shall be inserted in such securities; *And* that the said [B.] shall, during the continuance of the said copartnership, or so long as he shall continue a copartner, reside in the said house at ——, or in any other house in London wherein the business shall be carried on under the firm of "[A.], [B]. [C.], and Company," or such other firm as aforesaid, together with his family, free and exempt from the payment of all rent, taxes, and repairs on account of the same house; *And* that the said [B.] and [C.] shall take the active part in the management of the said partnership business to be carried on in London as aforesaid; *And* that the said [A.] (except as hereinafter is mentioned) shall not be under the obligation of giving continual attendance on *the business of the said bank, or any attendance whatsoever, when engaged in the concerns of his other business; *And* that the said [A.], [B.], and [C.], or any or either of them, shall not be under any obligation to give personal attendance to the business of the said banks at [L.] and [P.], or either of those places; *And* that the said [D.] shall take the active part in the management of the said partnership business to be carried on at [L.] as aforesaid; *And* shall not be under any obligation to give personal attendance to the business of the said banks in London and at [P.], or either of those places; *And* that the said [F.] shall take the active part in the management of the said partnership business to be carried on at [P.] as aforesaid; *And* that the said [E.], except as hereinafter is excepted, shall not be under the obligation of giving continual attendance thereon,

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three of the partners at least.

That the names of certain partners shall be inserted in such securities.

That one partner shall reside in the house in London.

Business in London to be managed by certain partners.

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——, or at such other banking house in London as the said partners shall from time to time mutually agree upon for the purpose of negotiating and transacting the agency business and other town business of the said partnership."

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or any attendance whatsoever when it shall not be convenient to him; *And* that the said [E.] and [F.], or either of them, shall not be under any obligation to give personal attendance to the business of the said banks in London and at [L.], or either of those places; *And* that the said [B.], [C.], [D.], and [F.], shall and will diligently and faithfully employ themselves in the business of the said copartnership, by giving their personal attendance thereto in manner and at the places hereinbefore mentioned; and that the said [A.] and [E.], by their advice and demeanour, and by supporting their personal credit and the respectability of the said banks, shall and will endeavour to promote the welfare and advantage of the said partnership business and concerns; *And* that all the said partners shall be true and faithful to each other in all their transactions and dealings in and about the business and concerns of the said partnership, and in and about all payments, receipts, and entries in anywise relating to or concerning the same; *And* that the rents and taxes of the several houses, shops, counting-houses, and offices in which the business of the said several banks shall from time to time be conducted, transacted, and carried on on account of the said partnership, and all expenses of repairs, and necessary or proper alterations; And also the salaries and wages of all clerks and servants employed and to be employed in the business of the said partnership, and *postages of letters, and all other necessary charges, expenses, and outgoings whatsoever to be occasioned or incurred in or about the business of the said partnership, or anywise relating thereto; and also all debts which shall be contracted or become due by or from the said partners on account of the said partnership business and all losses which shall happen or arise to the said partnership business by bad debts, or otherwise howsoever, shall from time to time be paid, borne, and sustained by and out of the said partnership effects, and the gains and profits thereof; *And* in case there shall be any deficiency, then by the said partners in proportion to their then several and respective shares in the partnership effects, and the gains and profits thereof, under the provisions hereinbefore and hereinafter contained; *And further*, that the said partners respectively shall, by themselves, or their clerks, from time to time during the continu-

That each managing partner will be diligent, &c.

That all the parties shall be true and faithful to each other.

That the rents, taxes, repairs, &c.

salaries and wages of clerks and servants;

postage of letters and all other necessary outgoings;

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and all losses shall be paid out of the partnership effects.

In case of a deficiency, by partners in proportion to their shares.

That proper books of account shall be kept

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ance of the said copartnership, write and make, or cause to be written and made, into proper books of account, to be kept for that purpose at each of the said banks respectively, true, plain, and perfect entries of all money which shall be received and paid by them respectively, or by any of their clerks under their direction, on account of the said partnership; *And also* all such other matters and things as are usually written and made in the books of account of bankers, together with all such circumstances of names, times, and places, as may tend to manifest the proceedings of the business of the said partners, and the state of their accounts, together with their losses and gains, and the amount of their debts and credits; *And* that the same books of account, and also all letters, bills, bonds, specialties, notes, and other writings concerning the business, dealings, transactions, and affairs of the said partners, on account of the said partnership, shall, according to the transactions to which the same letters and other articles shall relate, and the place or respective places at which the same transactions respectively shall take place, be kept either at the banking-house of the said partners in London, or at their banking house, or one of their banking houses in [L.], or their banking-house in [P.]; or otherwise the same letters and other articles shall be kept *in such other convenient place or places, as the said partners, or the major part of them in number for the time being shall, from time to time, fix or agree on, provided that one of them the said [A.], [B.], and [C.], shall join in such agreement (*a*); *And* that the said books of account, letters,

at the house where the business shall have taken place;

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or in some other place or places as the partners, or the majority of them, shall agree on.

Concurrence of certain partners requisite.

(*a*) In the case of *Const* v. *Harris*, Turn. & Russ. 525, Lord *Eldon* in allusion to the power of a majority of partners to bind the whole, said, "where there is any material change to be made which is to be a binding change, notice must be given to all parties of what that change is, and at what time it is to be taken into consideration." And again, "I call that the act of all, which is the act of the majority, provided all are consulted, and the majority are acting *boná fide*, meeting not for the purpose of negativing what any one may have to offer, but for the purpose of negativing what, when they are met together, they may, after due deliberation, think proper to negative. For a majority of partners to say, 'we do not care what one partner may say; we, being the majority, will do what we please,' is, I apprehend, what this Court will not allow."

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Books and all securities to be open to the inspection of all parties.

bills, bonds, specialties, notes, and other writings, concerning the business of the said partnership, shall, from time to time, and at all seasonable times during the said copartnership, and also after the determination thereof, thenceforth, until the accounts of the same partnership shall be closed and finally settled, be open to the inspection of the said partners respectively, and their respective executors and administrators: *And* that the said partners respectively, and their respective executors and administrators, shall be at liberty, either by themselves or their known and confidential clerks or agents, to make copies of, or take extracts from, the said books of account, letters, bills, bonds, specialties, notes, or other writings, or any or either of them, without the hindrance or interruption of any other or others of the said partners, his or their executors or administrators: *And* that neither of the said partners shall at any time during his continuance in the said partnership, borrow, receive, or take up, any money on account of the said partnership, without bringing the same into the stock of the said partnership; *And* that neither of the said partners shall at any time during the said partnership, in opposition to the will or direction of the major part in number of the said partners for the time being, lend any money or effects belonging to the said partnership, or give credit on account of the said partnership to any person or persons whomsoever; or take, hire, or dismiss any clerk or servant to be employed in and about the business and concerns of the said partnership; *And* that neither of the said partners shall at any time during the said partnership, or after the determination thereof, compound any debt or debts due or owing to the said partnership, (except such debt or debts as shall be allotted to him under the agreement, and in manner hereinafter mentioned), without the consent of the major part in number of the others of the said partners for the time being: *And* that neither of the said partners, except by *way of composition, to be made after such consent as aforesaid, shall release or discharge any debt, or deliver up any security, which from time to time during the said partnership shall be due, owing, or belonging to the said partnership, without receiving the full amount of the same debt, or an equivalent for the same, and bringing the money so received, or the amount or

Partners to be at liberty to make copies or extracts.

Neither party to borrow money on account of the partnership;

nor lend the partnership property;

or give credit;

or take, hire, or dismiss any clerk or servant,

or compound debts,

except, &c.

without the consent of the majority.

No partner to release any debt, or deliver up any security.

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BETWEEN BANKERS.

value thereof, into the stock of the said partnership; *And* that each of the said partners shall account for, and pay into the stock and cash of the said partnership, the full amount of every debt which he respectively shall receive, or for which he shall, without such consent as aforesaid, give a release or discharge; *And* that none of the said partners shall, contrary to the will of any one or more of the others of them, after notice for that purpose, at any time speculate in the public funds or in any Government security, by buying or selling, or making bargains for time, or in any other manner whatsoever, except for ready money, or subscribe any policy of insurance: *And* that none of the said partners shall enter into any bond, judgment, statute, or recognizance; or do any act, matter, or thing whatsoever (other than and except in the fair, regular, and ordinary course of the business of a banker), by means whereof the said capital or joint stock of the said partnership, or any part thereof, or any money, credits, or effects belonging, due, or owing to the said partnership, may be seized, attached, or taken in execution: *And* that, in all questions, differences, or disputes, which may happen to arise between the said partners for the time being, touching or concerning the said joint concern, or the management or regulation thereof, or any act, transaction, matter, or thing relating thereto, the voice and determination of the major part in number of the said partners for the time being shall be final and conclusive on the other or others of the said partners for the time being; unless the other or others of them shall be desirous of submitting the determination of the matters in difference to arbitration, pursuant to the provision hereinafter contained in that behalf, and, within three days after such determination of the major part of his or their partners for the time being shall be communicated to him or them, shall require a reference to *arbitration upon the same; *And* then and in that case, the determination which shall be made upon such reference to arbitration, shall be final and conclusive between the parties: *And* that each of the said partners, his heirs, executors, and administrators, shall, from time to time, and at all times hereafter, keep harmless and indemnified the others of them respectively, and their respective heirs, executors, and administrators, and the said capital or joint stock, and

Each partner to account for every debt received, or for which he shall, without consent, release.

Neither partner shall, contrary to the will of the other, speculate in Government securities; or be an insurer; or enter into any bond, judgment, &c.; or do any act, except in the regular course of business.

All disputes respecting the management of the business to be decided by a majority,

unless the others shall be desirous of submitting to arbitration.

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Such determination to be conclusive.

Indemnity against private debts and engagements.

BETWEEN BANKERS.

the gains and profits thereof, from and against his own private and separate debts and engagements, and all costs, charges, damages, and expenses on account thereof: *And* that on the —— day of ——, in every year during the continuance of the said copartnership hereby established, or as soon after that day as conveniently may be, a full and general account or rest in writing shall be made and taken at each of the said banks of all and singular the money, credits, and effects, which shall be then in or belonging, due or owing, to the said partnership; and of all such debts as shall be due or owing from or by the said partnership to any person or persons whomsoever, on account of business transacted by or with the said banks respectively; *And also* of all such other matters and things as are usually comprehended in annual accounts of the same nature taken by bankers: *And* that the said general account or rest of each bank shall, from time to time, be written and entered into as many books as there shall be partners at the time of taking such general account, or making such rest: *And* that one of the said books shall be delivered to each of the said partners, and shall contain the general yearly account of each of the said banks respectively, and also a general account of profit and loss accruing to the said banks respectively, and also to the said partnership generally; *And* that the books for the year ending on the —— day of —— next, shall comprise all the profits, losses, and gains of the said several banks of the said partnership, from the —— day of —— last: *And* that each of the said partners respectively shall state his objections, if any, to the said annual account, within ten days after the same annual account shall be delivered to him, or left for him at any one of the said banks: *And* that if such objection shall be made, and the same cannot be amicably settled by *and between the parties, *Then* the item or items thereof to which objection shall be made, shall be referred to arbitration, pursuant to the provision hereinafter contained in that behalf: *And* that unless such objection shall be made within the time hereinbefore limited in that behalf, the account so made out shall, after that time, be considered as settled and free from objection; *And* that when and as soon as the said annual account shall be adjusted and settled by and between the parties, or by reference to arbitration, or

Annual general accounts to be kept,

to be written in books for each partner.

Each partner to state his objections to such account within ten days.

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Otherwise the account to be considered as settled.

When settled, the partners to sign it,

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the time for making objections thereto shall be elapsed, and no objections made, the same account shall be signed by all the partners for the time being; *And* the said partners shall be bound and concluded by the said account, whether the same shall have been signed or not, unless some manifest error, to the amount of twenty pounds or upwards, shall be discovered therein within three calendar months from the time when the said account shall be delivered to or left for the said partners respectively as aforesaid; *And* in that case the said account shall be opened and settled, so far only as relates to the error or errors which shall be discovered therein as aforesaid: *And* that, immediately after closing every such annual account as aforesaid, the clear and net gains and profits which shall have arisen from the said partnership concern during the preceding year, ending on the —— day of —— as aforesaid, shall, until the shares shall be varied under the provision hereinafter contained, be divided into three equal parts; *And* that two of the said parts shall belong to the said [A.], [B.], and [C.], or to their executors or administrators, to be divided between them, share and share alike; *And* that the other of the said three parts shall belong to the said [D.], [E.], and [F.], or their executors or administrators, to be divided between them, share and share alike: *And it is hereby provided, declared, and agreed,* that, in the meantime, and between the taking of every or any such annual account, it shall or may be lawful to and for any of the said partners to have and take out of the stock of the said partnership effects, any sum or sums of money for his or their own private current expenses, not exceeding the interest on his or their share of the capital of the said stock, to be advanced by him or them as afore-*said, at the rate of five pounds *per centum per annum; And* so as the capital of the said partnership stock, amounting to £—— as aforesaid, shall not in any manner, or at any time, be diminished; and so as credit for all and every the sum and sums of money, to be taken out of the said capital stock by each of the said partners respectively, shall be given by the said partners respectively to the general account of the said partnership in the meantime, and until the next yearly general account shall be adjusted and settled; and an allowance for the sums so taken or received shall

and be concluded thereby.

Appropriation of profits upon closing such annual account.

Each partner to draw out money for his private use not exceeding the interest of his share of capital,

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so as not to diminish the capital,

and so as such money shall be accounted for in the next general annual account.

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be made out of the share of the profits or capital stock belonging to the partners respectively by whom such sums respectively shall have been taken or received. And *it is hereby further declared and agreed*, that, if any one or more of the said partners shall depart this life before the expiration of the said term of —— years, then and in that case a rest shall be made in the accounts of the said partnership; and the same shall be closed in full to the day of the death, or the days of the respective deaths of such partner or partners respectively: *And* that, as soon as the accounts of the said partnership can be settled and ascertained, the share of the profits or gains of the said deceased partner or partners in full, to the day or the respective days of the death or respective deaths of the partner or respective partners who shall depart this life as aforesaid, and also the share or shares of such deceased partner or partners, of and in the capital stock and effects of the said partnership (excepting bad debts and money owing on doubtful securities), and also a share of the bad debts, and money owing on doubtful securities, when and as or if the same shall be recovered by the surviving partner or partners, shall, after leaving with the surviving partner or partners the proportion of such deceased partner or partners, of and in all debts owing by the said partners in respect of their said partnership, be paid to the personal representatives of such deceased partner or partners; *And* that all debts owing by the said partners on account of the said partnership, shall be paid in full to the death of such respective partners, when and as the same shall become due, or as soon after as the payment of the same shall be demanded: *And* that the surviving partners shall, by a *bond or obligation in a sufficient penalty, become jointly and severally bound to the personal representatives of the deceased partner or partners for the payment of the said outstanding debts, within the period of —— from the time of the decease of such partner or partners, and also for the indemnity of the personal representatives, and the estate and effects of the said deceased partner or partners respectively, of, from, and against the said debts, and all actions and suits at law and in equity on account of the same: *And* that the right of the personal representatives of such

On death of any partner a rest to be made,

and his representatives to receive his share of the profits.

All partnership debts, upon the death of any partner, to be paid when due.

Surviving partners to indemnify deceased partner's representatives against outstanding debts.

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Right to profits

deceased partner or partners in or to the future profits of the said capital stock, and their responsibility on account of the losses of the same, shall cease from the death or respective deaths of the partner or partners respectively; and on that day, or as soon thereafter as the death of such partner or partners shall be known, the name or names of such deceased partner or partners respectively shall be taken from the firm of the said partnership (*c*): *And it is here-*

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&c. to cease on death.

Neither partner to carry on the

(*c*) The following provision presents another mode of winding up the affairs of the partnership, on its determination by death or otherwise. It was inserted in the partnership deed of a country bank, which, it will be perceived, contained a direction that, in taking the annual accounts, a valuation should be made of the partnership property. It supposes, too, the case of some of the partners being desirous of continuing the business after the expiration of the partnership:

"THAT in case any of the said partners shall die before the expiration of the term of the said partnership, or in case, at the expiration or other sooner determination of the said partnership, any of the said partners shall retire from the said banking business, and the other or others of the said partners shall be desirous of carrying on the same, Then the share or respective shares of the partner or respective partners so dying or retiring from the said business, may be taken by the other or others of the said partners; for which purpose it is hereby agreed, that the banking-house, counting-house, and premises wherein the said business shall be carried on, or the term and interest of the said partnership therein, with the fixtures, furniture, and other articles belonging thereto, shall be taken at the value which shall have been fixed upon the same in the last preceding *yearly account of the said partnership; and a general account of the other stock, credits, and effects of the said partnership, and of the profits arising from the said business, shall be taken and made up to the —— day of ——, or the —— day of ——, whichever shall first happen next after any of the said partners shall so die, or quit or retire from the said business as aforesaid, and from which period the liability of such partner or partners, in respect of the said partnership, shall cease; and the value of the share or shares of the partner or partners so dying or retiring, in the

Option to surviving or continuing partners to purchase the share of deceased or retiring partner at the preceding yearly valuation.

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by further declared and agreed, that none of them the said partners shall or will, at any time or times during the said business of a banker.

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said stock, credits, effects, and profits, shall be ascertained and settled by the parties interested therein; or, if they shall disagree, then by two indifferent persons, one to be nominated by each party; and the amount of the value of the share or shares of the partner or partners who shall so die or quit the said business as aforesaid, of and in the said partnership property, shall be paid to him or them, or his or their executors or administrators, by the other or others of the said partners, within —— calendar months after such value shall be ascertained, but without any interest for the same in the meantime: And the partner or partners, his or their executors or administrators, to whom such payment shall be made, shall thereupon make and execute such acts, deeds, assignments, and assurances as may be requisite for effectually vesting the share or shares so purchased as aforesaid in the other or others of the said partners; and for enabling him or them to collect, get in, and receive the monies, credits, and effects due, owing, or belonging to the said partnership: And the partner or partners purchasing the share or shares aforesaid, shall execute and deliver to the other or others of the said partners, his and their executors and administrators, a bond or bonds, in a sufficient penalty, for indemnifying the obligee or obligees in the said bond or bonds, his or their executors and administrators, against all the debts and demands due or owing by or from the said partnership: such assignment and bond to be prepared by and at the expense of the purchasing partner or partners.

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"THAT if, at the expiration of the term of the said partnership, or at any sooner determination thereof, none of the said partners shall be desirous of continuing the said business; or in case the continuing partner or partners shall refuse to take the share or shares of the partner or partners quitting the said business, or dying, or to pay the value thereof in manner aforesaid, then a general rest or account shall be made and taken of the said partnership stock, credits, and effects, and the said stock and effects shall be

In case of refusal, property to be converted, and the produce divided.

BETWEEN BANKERS.

partnership, exercise or carry on, either separately or in partnership with any other person or persons, the said business of a banker, or any branch thereof, in any manner howsoever; And that, if any or either of the said partners shall, during the continuance of the said partnership, carry on the business of a banker or any branch thereof, in any other manner than in partnership with the other or others of the said partners, by virtue of these presents, *Then*, and in that case, the profits arising to the partner or partners by whom such business shall be carried on otherwise than in partnership with the others of them the said partners for the time being, shall be divided between the said partners for the time being, according to their then shares and proportions in the profits of the partnership *hereby established (*d*); *But* that all the losses of such business

If any partner do, the profits to be divided between the partners.

[*123]

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converted into money, and the said credits collected in; and out of the money to arise from the said stock, credits, and effects, all the debts and demands justly due or owing by or from the said partnership shall be, in the first place, fully satisfied, and the surplus or residue of the said monies shall be forthwith divided between the said partners, their executors or administrators, in the shares and proportions aforesaid. But in case the said partnership monies shall not be sufficient to discharge all the debts due or owing by, and the demands upon, the said partnership, then each of the said partners, their executors and administrators, shall contribute, in the same proportions, to make good the same debts or demands."

(*d*) This is a common, but is an objectionable clause, as it seems to constitute the present firm partners in the other concern, by participation in profit. To remove this objection, the provision may be framed in the following terms :—

Suggested variation of clause in the text.

"That if &c. *ut supra*, then, and in that case, he or they shall forfeit to the other partner or partners a sum equal to the profits which the offending partner or partners shall have gained in such business, to be retained by the other partner or partners out of the share or respective shares of the offending partner or partners in the profits of the partnership business hereby established."

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shall be exclusively borne by the partner or partners by whom the same shall be carried on otherwise than as aforesaid: And *it is hereby further declared and agreed*, that, in case any one or more of the said partners shall neglect or refuse to bring into the said partnership stock his or their share or respective shares of and in the said capital of £——, on or before the — day of —— next, or, at any time during the continuance of the said partnership hereby established, shall depart the realm for debt, or for any crime, or shall become a bankrupt, or insolvent within the intent and meaning of any act for the relief of insolvent debtors, or shall suffer his or their body or bodies to remain in execution for more than one day, or, after being arrested, shall lie in prison for more than three days without procuring bail to such arrest, or shall procure hired bail, or shall permit any part of the said partnership effects to be taken in execution, attached, or sequestered for any debt or debts owing, or to be owing by him or them, on his or their separate account, to the amount of one hundred pounds or upwards; *Or*, if any one or more of the said partners shall refuse to join in an arbitration, when thereunto requested, pursuant to the provision hereinafter contained; or to execute a deed of reference and a bond of arbitration upon every such reference; or shall refuse to name an arbitrator; or, unless prevented by sickness or other unavoidable accident, shall not attend the arbitrators, when named, at the times and places they shall reasonably appoint; *or shall depart from his dwelling-house for the time being, for the purpose of secreting himself from his said partners for the time being, or his creditors for the time being; or shall refuse or decline to keep up a regular and constant communication in person, or correspondence by letter, with his partners for the time being, and to answer their letters on the business of the said partnership, so as to assist in the conduct and regulation of the said business, according to the true intent and meaning of these presents and the articles and agreements hereinbefore contained; *Or*, if any one or more of them the said [B.], [C.], [D.], and [F.], (unless prevented by sickness, or any other reasonable cause of excuse), shall, for the space of thirty-one days in any one year, (to be computed day by day, and not only for a continuing space of time), and contrary

If any partner neglect to pay his share of the capital, or depart the realm for debt, or any crime, or become bankrupt,

suffer his body to remain in execution for more than one day, lie in prison more than three days, or procure hired bail, or suffer any part of the partnership property to be taken in execution, or refuse to join in any arbitration,

or to execute a deed of reference, refuse to name an arbitrator, or attend the arbitraors;

[*124]

secrete himself from his partners or creditors;

refuse or decline to communicate with his partners;

absent himself for thirty-one days, contrary to the request of his partners, from partnership business;

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to the request of the other partner or partners, or the major part of them, decline or refuse to take an active part in the conduct of the business of the said partnership, according to the stipulations hereinbefore contained; *Or*, if any one or more of the said parties to these presents shall be concerned in the business of a banker, or in any branch of such business, otherwise than as partner or partners with the other or others of them; *Or* shall contract any debt, or draw any bill of exchange on account of the said partnership, either in one sum or in several sums, to the amount of one hundred pounds, within one year, commencing from and ending on the —— day of —— as aforesaid, otherwise than in the regular course of business, and as a consideration for an equivalent received or to be received into the stock of the said partnership effects; *Or* shall, contrary to his said covenant in that behalf, speculate in any Government security, or subscribe any policy of insurance: *Then*, and in either of the said cases, at any time within three calendar months after any such offence or default shall have become known to the others of the said partners, it shall be lawful for them, or the major part of them in number, if they shall think fit, and upon giving to the partner or partners so offending or making default, or leaving at his or their dwelling-house, or the place or respective places of his or their most usual residence or abode in England, or affixing in any conspicuous part of *the counting-house for the time being, in which the business of the said partnership shall be carried on, a notice to that effect, to dismiss from the said partnership the partner or partners offending or making default in any one or more of the particulars hereinbefore mentioned; *And* that, from the time of delivering, leaving, or affixing such notice as aforesaid, or at any other time to be appointed therein, the partner or partners to or for whom such notice shall be delivered or left as aforesaid, shall cease to be a partner or partners; without prejudice, nevertheless, to the remedies of the respective partners for the breach or non-performance of all and every, or any or either, of the said articles, clauses, and agreements at any time or times before the time of giving, leaving, or affixing the said notice in manner hereinbefore mentioned: PROVIDED ALSO, *and it is*

or be concerned in any other banking business;

contract any debt on account of partnership, other than in the regular course of business;

or speculate in the funds, &c. or make any insurance:

In either of the said cases the majority of the partners may expel the offending partner by notice;

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without prejudice to remedies, &c.

Power to any of

BETWEEN BANKERS.

the partners to withdraw after a certain period.

hereby further declared and agreed, that it shall be lawful for any one or more of the said partners, at any time during the said partnership, after the expiration of —— years from the —— day of —— now last past, to withdraw himself from the said partnership, upon giving or leaving to or with his said partners for the time being, or any one or more of them, or at the last or most usual place of his or their residence in England, or affixing in the shop or counting-house of the bank for the time being of the said partnership to be kept in London, a notice in writing under his hand to that effect, and also entering into a bond (to be prepared at his own expense) to the other partners, in the penalty of ten thousand pounds, to be conditioned for the payment of five thousand pounds, by way or in the name of stated or liquidated damages, in case the partner or partners withdrawing himself or themselves from the said partnership, shall, either alone or in partnership with any other person or persons, carry on the business of a banker at any time afterwards, and during the continuance of the said partnership hereby established, either in the city of London, the city of [L.], and town of [P.], or within twenty miles of those places respectively: AND *it is hereby further declared and agreed*, that, when any one or more of the said partners shall withdraw or be dismissed from the said partnership, under the provisions hereinbefore contained, a notice of *the determination of the said partnership, so far as relates to the partner or partners who shall withdraw or be dismissed from the said partnership as aforesaid, shall be signed by all the partners, and inserted in the London Gazette (*e*);

Partner withdrawing to bind himself not to carry on the business of a banker.

Upon any partner's withdrawing, the same to be notified in the London Gazette, and an account taken of the partnership property.

[*126]

(*e*) As the dismissed partner may refuse or be unable to sign this notice, a power is frequently added, to this effect:—

Power to partners to sign notice of dissolution for seceding partner, in certain cases.

"And that if any of the said partners shall neglect or refuse, for the space of —— days after being thereunto requested by the others or any of the others of them, to sign such notice, or shall, by reason of illness, absence from the kingdom, or otherwise, be incapable of signing the same, then and in every such case it shall be lawful for the other partners to sign and subscribe such notice in the name and as the attorneys of the partner or partners who shall so

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And that, upon such dissolution, an account shall forthwith be taken of the capital stock of the said partnership, and of the profits, losses, and gains thereof, in full, to the time or several times when such partner or partners respectively shall withdraw or be dismissed from the said partnership; *And* that the share or respective shares of the said partner or partners respectively in the ready money of and belonging to the said partnership, and also the value of the said lease, fixtures, and other articles, and all other leases, fixtures, and articles belonging to the said partnership, and also in all the credits of the said partners on account of the said partnership, (when and if the same shall be recovered by the continuing partner or partners), shall, after setting apart and appropriating a sufficient fund for the payment of all debts owing by the *said partners on account of their said partnership, be paid to the partner or partners who shall withdraw or be dismissed from the said partnership; *And* that all debts owing by the said partnership shall be paid when and as the same shall become due, or as soon afterwards as the payment of the same shall be demanded; *And* that the continuing partner or partners shall, and, if more than one, then jointly and severally, by a bond or obligation in a sufficient penalty, become bound to the partner or partners who shall withdraw or be dismissed from the said partnership as aforesaid, for the payment of the said outstanding debts and demands, *And also* for the indemnity of the said partner or partners who shall withdraw or be dismissed from the said partnership as aforesaid, and his and their heirs, executors, administrators, and assigns, lands, tenements, goods, chattels, and

And the share of the partner withdrawing paid him.

[*127]

And all partnership debts paid when due.

Continuing partners to give a bond of indemnity to partner withdrawing or dismissed.

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neglect or refuse, or be incapable to sign the same as aforesaid."

The practice, however, at the office of the London Gazette, it is understood, is not to insert an advertisement of dissolution, signed by the other partners under a power of this kind, without evidence that the partnership has been duly dissolved, which evidence, the nature of the circumstances required to be proved must often render it impossible to furnish. In addition to the advertisement in the Gazette, notice should also be sent to the customers of the firm (*vide ante*, p. 28); but, as this may be done by the continuing partners, it is unnecessary to insert any express authority for the purpose.

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effects, of, from, and against the said debts and demands, and all actions and suits at law and in equity on account of the same: And *it is hereby further declared and agreed*, that, when any one or more of the said partners shall depart this life, or withdraw or be dismissed from the said partnership, the leases or property of the houses in which the banking business shall be carried on, and also the fixtures and other articles belonging to the banking business, shall remain and become the property of the surviving or continuing partners, in the same proportions in which they shall be entitled to the future profits of the said partnership, and a proportion of the value of the same shall be paid to the partner or partners who shall withdraw or be dismissed from the said partnership as aforesaid (*f*): And *it is hereby de-*

Leases and fixtures to belong to surviving or continuing partners.

Appropriation of

(*f*) As lunacy does not *per se* work the dissolution of a partnership, or enable the remaining partners to dissolve it (*vide ante*, p. 25), it is important that a power to this effect should be expressly given them:—

In case of the lunacy of any partner, the remaining partners may dissolve the partnership.

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"And *it is hereby further declared and agreed*, that, if any or either of the said partners shall at any time during the continuance of this partnership be found lunatic, then and in every such case it shall be lawful for the others of the said partners, or the major part in number of them, at any time thereafter, by any writing under their hands, to be delivered to the committee of the personal estate of such lunatic partner, or left at his last or usual place of abode, to determine and dissolve the said partnership as to such partner; and the share of such lunatic partner in the capital and effects of the said partnership shall be ascertained in like manner as is hereinbefore provided in the event of the decease of any partner or partners; and the amount of such share shall be paid to the committee of the personal estate of the lunatic partner by the continuing partners, in like manner as the share of any deceased partner is hereinbefore directed to be paid to his representatives; and the same arrangements shall in all respects be made in the event of such lunacy (so far as the nature of the case will admit) as are hereinbefore directed to be made in the event of the decease of any partner or partners: And it shall be lawful for the partners dissolving the said partnership under this present

clared and agreed, that when, and as soon as the said partnership shall be determined, as to any one or more of the said partners, by his or their death, or by his or their withdrawing or being dismissed from the said partnership (*g*) before the expiration of the said term of —— years; *Then* the original and also the derivative and additional share or shares of and in the said partnership concern of such partner or partners respectively shall belong to the surviving or continuing partners in proportion to their original shares in the capital of the same partnership; *And* that the surviving or continuing partners shall, in the same rate or proportion, replace and supply the part or share, or several parts or shares, of and in the capital stock of the said partnership, amounting to £—— as aforesaid, which shall be drawn from the said partnership by or on the account of *the partner or partners respectively who shall depart this life, or withdraw, or be dismissed (*h*) as aforesaid, or by his, her, or their respective executors or administrators: AND *it is hereby further declared and agreed*, that if more than one of the said partners shall be living and in partnership together at the expiration of the aforesaid term of —— years, then, and in that case, a general account or rest in writing shall be made and taken by and between such surviving or continuing partners, of all and singular the money, credits, estate, and effects whatsoever, which shall be due, owing, or belonging to the said partnership, and also of all debts due and owing by or from the said partnership to any person or persons whomsoever; *And* that, upon the closing and settling such accounts, such surviving partners shall forthwith pay, or make provision for the speedy payment and satisfaction of their respective shares of all such debts then

the shares of partners dying, withdrawing, or dismissed.

Capital of deceased or retiring partner to be replaced.

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At the expiration of the term a general rest or account of the partnership effects to be taken.

And the surviving partners to pay their parts of such of the partnership debts as can be

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power, to subscribe the name of such lunatic partner, as his attorneys, to a notice or advertisement announcing such dissolution in the London Gazette."

As lunacy does not dissolve a partnership, notice in the Gazette is requisite in order to discharge the lunatic's estate from liability to the engagements of the firm.

(*g*) "or becoming lunatic."

(*h*) "or become lunatic."

immediately discharged; and lay out in the Three *per cents.* a sufficient sum to pay reaining debts;

owing by the said partnership as can or may be immediately discharged, and shall lay out and invest in the purchase of capital stock in the Three *per cent.* Consolidated Annuities, in the joint names of such surviving partners, or some trustee or trustees, to be appointed by them, so much money as shall be sufficient to answer, pay, and satisfy all outstanding notes and other debts given, issued, and owing by or from the said partnership, as cannot be immediately discharged as aforesaid; and shall from time to time sell and dispose of a sufficient part of the said stocks or funds for the discharge of all the said outstanding notes and such other debts as last mentioned, when and as the payment of the same notes and debts respectively shall be demanded or required; and, upon the expiration of the said partnership, shall cause the lease of the said house in —— to be forthwith sold by public auction for all the estate and interest of the said partners therein; *And also* sell and dispose of all other articles and utensils belonging to the said partnership, and divide between them, according to their respective shares therein, on the expiration of the said partnership, all the money arising from the sale of the said lease and other articles, and also *all other the monies, credits, estates, and effects whatsoever, belonging or owing to the said partnership, after the discharge of all the outstanding notes and debts of the said partnership, or making provision and setting apart a fund for answering and paying the same as aforesaid; *And that* immediately after such partition and division shall be made, the said surviving and continuing partners shall reciprocally assign unto each other the respective shares which shall be allotted to them respectively in and out of the said credits, sums of money, and other effects of the said partnership, with full power and authority to recover and receive the same; such assignments to be prepared by and at the expense of the partners respectively taking the same; *And* that, after such partition or division shall be made, neither of the said surviving partners, his executors or administrators, shall or will release or discharge the credits which shall be allotted to the other or others of them, without the consent of the person or persons respectively to whom the same respectively shall be allotted, his or their executors or administrators: And *it is hereby further declared and agreed*, that

and from time to time apply such fund accordingly.

Lease &c. to be sold at the expiration of the partnership, and the monies, &c. divided.

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Assignment to be executed of the allotted shares.

Neither partner to release, without consent, the part allotted to the other.

Agreement to

BETWEEN BANKERS.
refer disputes to arbitration.

if at any time during the said partnership, or at any time after the end or other sooner determination thereof, any dispute or question shall arise between the said parties, their heirs, executors, or administrators, or any two or more of them, concerning the business of the said partnership, or any covenant or provision herein contained, or respecting the dealings and transactions, profits and losses, of the business of the said partnership, [or any one or more item or items of their accounts, or any entry or entries relating to the same accounts, or touching or concerning the breach or non-performance of all and every, or any or either of the clauses and agreements hereinbefore contained, or the right of dismissing one or more of the partners from the said partnership, or the right of any one or more of the partners to withdraw from the said partnership, or by reason of any irregular, improper, or immoral behaviour of any one or more of the said partners], Then the grounds or cause of every such dispute or question shall, upon the request of any one or more of the parties in such difference, and within three days after such request, be reduced *into writing, and signed by the parties in difference, or by [*131] the party or parties complaining, and shall be referred to the arbitration of two indifferent persons, one to be named by the person or persons who will take one side of the matter in difference, and the other to be named by the person or persons who shall take the other side of the matter in difference: *And* that in case the person or persons who shall take either side of the said difference shall refuse to name or to join together in naming a referee, within seven days after notice in writing for that purpose, to be affixed in some conspicuous part of the counting-house of the said partnership; then the grounds of every such dispute or question shall be reduced into writing, and signed by the person or persons who shall take the other side of the difference, and be referred to the arbitration of two indifferent persons, to be named by the person or persons who shall sign the said last-mentioned writing, containing the grounds or cause of every such dispute or question: *And* that in case the two referees to be named by both or one of the said parties, as aforesaid, cannot agree on an award,

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then to the umpirage and arbitration of such one person as the said referees shall appoint by any writing under their hands: *And* that every such reference shall be made within —— days next after such dispute or question shall arise: *And* that the order or determination which shall be made by the said two referees or their umpire, concerning the premises referred to him or them, or any part thereof, shall be final and conclusive on the said partners respectively who shall be parties to such reference, and their respective heirs, executors, and administrators; *And* such referees or their umpire shall have full power and authority, if he or they shall think fit, and without any reason to be assigned for that purpose, to dismiss any one or more of the parties to such reference from the said partnership, or to dissolve the said partnership, and to make any orders, rules, and regulations, prescribing the time and the terms of such dismissal or dissolution; and also the time and manner in which the accounts relating to the partner or partners who shall be dismissed as aforesaid, or the accounts of the said partnership, if the same is to be dissolved, shall be settled and adjusted, and the balance of the *share or shares thereof paid to or by the partners respectively, as the case shall require: *And* that such person or persons who shall be a party or parties to such reference on the one part, shall enter into a bond of reference with the person or persons who shall be a party or parties to the said reference on the other part, and in the usual form, to stand to, obey, and keep the same determination when made, without any further suit or trouble whatsoever; So as such referee shall make their award in writing under their hands, or appoint an umpire within —— days next after such reference to them, and so as such umpire shall make his determination in writing under his hand, within —— days next after he shall be appointed an umpire: *And* that every bond of award, or deed of reference, shall contain an agreement, that the submission shall be made a rule of his Majesty's Court of King's Bench at Westminster, on the application of either of the parties to the same reference, his or her executors or administrators, and that the reference shall not be defeated or affected by the decease

Referees or their umpire to be empowered to dismiss any partner,

or to dissolve the partnership, prescribing the terms.

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Each party to any reference to enter into a bond of reference.

Award to be made a rule of court.

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of all or any of the parties thereto pending the same (*i*). *And also,* that no suit at law or bill in equity shall be brought, commenced, sued, or prosecuted against the referees thereby appointed, or their umpire, touching or concerning their award or determination: *And* that the respective parties to such reference shall or will submit and consent to be examined on oath by the said referees or their umpire, for the discovery of any of the dealings or transactions of the said partnership relating to the matters in difference: *And it is hereby further agreed,* that no suit at law or in equity, upon or by virtue of these presents, or any clause or article herein contained, shall or may be commenced, preferred, or instituted by either of the said partners, his heirs, executors, or administrators, against the other of them, his heirs, executors, or administrators, before the partner or partners, his or their executors or administrators, who is or are to be a party or parties, defendant or defendants to such suit or suits, shall have refused or declined to refer the matters in difference to *arbitration, pursuant to the agreement hereinbefore contained; or the referees or their umpire shall have declined or omitted to make any award or determination within the respective times hereby appointed for that purpose (*k*): And it is hereby further declared and agreed, that, when such difference shall arise between any two or more of the partners, each of the other partners for the time being shall have notice thereof, by writing to be left, or letter to be addressed, at the place of his last or most usual place of abode in England; to the intent that the said partners respectively may have the option of taking a part in the matters in difference on either side: *And* that the partner or partners who shall refuse or decline to become a party to such reference, shall be bound and concluded by all the proceedings thereon, and by the award and determination of the arbitrators or their umpire, in the same manner, to all intents and purposes, as if he or they had been a party or parties to the matters in difference concerning which such award or determination shall be made, and had joined in referring the same. In witness, &c.

No suit to be commenced against the referees.

Parties to submit to be examined on oath.

No suit to be commenced by either partner against the other,

unless such defendant shall have refused to refer to arbitration.

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When any difference shall arise between two or more partners, notice thereof to be given to the others.

Partner declining to be a party to such reference to be concluded.

(*i*) As to this, *vide ante,* Vol. 2, p. 585 *a,* 2nd edition.

(*k*) *Vide ante,* p. 34.

BETWEEN TWO BREWERS.

DEED *of* PARTNERSHIP *between a* BREWER *and his* CLERK; *the latter being* ADMITTED *to* ONE SIXTH *Share, on his paying* ONE SIXTH *of the* VALUE *of the brewing* UTENSILS, STOCK, GOODWILL, &c. ASSIGNMENT *of* SHARE. *On the* DETERMINATION *of the Partnership by* EFFLUXION *of* TIME, *or* NOTICE, *the* SENIOR PARTNER *to have the* OPTION *of* PURCHASING JUNIOR PARTNER'S SHARE *at a* VALUATION, *to be secured by Bond.* GOODWILL *and certain* PARTS *of the* STOCK *to be* VALUED *in a* PRESCRIBED MANNER. SENIOR PARTNER *to* COLLECT *the* CREDITS; *and, after a* CERTAIN PERIOD, *to* PURCHASE *such as are* OUTSTANDING. ASSIGNMENT, POWERS, *and* INDEMNITIES, *to be* EXECUTED. *One Partner to* ATTEND *to the* BUSINESS, *the other need not: one may* ASSIGN, *the other not. In case of* DEATH *of* EITHER, *the* SENIOR PARTNER, *or his* REPRESENTATIVES, *may* PURCHASE *the other's Share.* INDEMNITY *against* ACTIONS *to be brought by such Representatives in the* OTHER'S NAME. *Partnership* DETERMINABLE *by* EITHER *on* NOTICE. VARIOUS CLAUSES, *defining the* RIGHTS *and* DUTIES *of the respective* PARTNERS *in which they are for the most part* PLACED *on a* DIFFERENT FOOTING. ARBITRATION CLAUSE.

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, BETWEEN [A. A.], of &c. brewer, of the one part; and [B. B.], of &c., brewer, of the other part: WHEREAS, by an indenture of lease, bearing date on or about the — day of ——, in the year of our Lord ——, and made between [R.], therein described, (mortgagee of the hereditaments therein demised), of the *first part; [S.], therein also described, (owner of the equity of redemption of the said premises, subject to the said mortgage), of the second part; and [T.], therein described, of

Recitals of a lease of the brewery, in which the business is to be carried on, to A. A.

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BETWEEN TWO BREWERS.

the third part; the said [R.], at the desire of the said [S.], and also the said [S.], did demise and lease unto the said [T.], his executors, administrators, and assigns, *All that (describe parcels), To hold* unto the said [T.], his executors, administrators, and assigns, from the —— day of —— then last past, during the term of —— years thence next ensuing, at and under the clear yearly rent of £——, payable as therein mentioned: AND WHEREAS by divers mesne assignments and other effectual assurances in the law, the said premises comprised in, and demised by, the said recited indenture of lease, have become and are now vested in the said [A. A.], for all the residue of the said term of —— years thereby granted, and now unexpired therein, subject to the said yearly reserved rent of £——: *(Recite leases of other parts of the premises to* [A. A.]): AND WHEREAS the said [A. A.], since he so became possessed of the said several premises in the said several recited indentures of lease comprised, hath expended considerable sums of money in making new erections and buildings thereon, and also in making repairs, alterations, and improvements in and to the same: AND WHEREAS the said [A. A.] hath for many years last past carrried on the trade or business of a brewer in and upon the said several premises, and hath by great labour and attention, and at considerable expense, increased the said trade or business, so that the same is now become very lucrative and beneficial to him the said [A. A.]: AND WHEREAS the said [B. B.] hath for many years last past served the said [A. A.] with great fidelity, as a clerk, in the same business; and he the said [A. A.], being desirous, as well to relieve himself from part of the labour of conducting the said trade or business, as to reward the faithful services of the said [B. B.], hath proposed and agreed to admit him the said [B. B.] into copartnership with him in the said trade for one sixth part thereof, in manner hereinafter mentioned; and it hath been agreed among other things, by and between the said [A. A.] and [B. B.], that the beneficial interest of him the said [A. A.], of and n the said several premises, under and by virtue of the said several *recited indentures of lease, exclusively of the said new buildings, repairs, alterations, and improvements, should be valued by indifferent persons, to be named by the said

That the lease has become vested in [A. A.]

That [A. A.] had expended considerable sums in building and improvements.

That [A. A.] hath heretofore carried on business as a brewer.

That [B. B.] hath been his clerk, and [A. A.] is desirous to admit him as partner on the terms after mentioned.

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[A. A.] and [B. B.] for that purpose; and that he the said [A. A.] should continue possessed of the said leases, and should receive from the said copartnership trade, as well the amount of the said several reserved yearly rents of £——, thereby respectively reserved, as interest at and after the rate of *5l. per cent. per annum* on the amount of the valuation of such beneficial interest, by way of rent, in respect of the said several premises, in and upon which the said copartnership trade is to be carried on; *And* that all new erections and buildings, and all repairs, alterations, and improvements, made, erected, and built by the said [A. A.] in and upon the said premises respectively; and also the good-will of the said trade, and all the engines, machinery, implements, utensils, goods, wares, malt, hops, beers, ales, horses, drays, commodities, effects, and stock, of what nature or kind soever, in and upon the same premises, employed and used in carrying on the same trade or business, should also be valued by indifferent persons, to be named for that purpose by the said [A. A.] and [B. B.]; And that on his the said [B. B.'s] paying, or securing to be paid to the satisfaction of the said [A. A.], one sixth part or share of such last-mentioned valuation, he the said [A. A.] should assign to the said [B. B.] one full sixth part (the whole into six parts to be divided) of and in the said new erections, buildings, improvements, good-will, engines, machinery, implements, utensils, goods, effects, and stock of the said trade or business: And whereas the said [A. A.] did, on the day next preceding the day of the date of these presents, cause a rest to be made in the books of his said trade or business; and, in pursuance of the agreements hereinbefore mentioned, a valuation was made by competent and indifferent persons named by the said [A. A.] and [B. B.] for that purpose, of the beneficial interest of the said [A. A.] in the said several premises in which the said trade or business hath been and is intended to be carried on, except as hereinbefore is excepted, and the same was estimated and valued at the sum of £——, the interest whereof, at and after the rate of *5l. per cent. per annum*, makes the sum of £——, which, together with the several rents or sums of £—— and £—— by the said several recited indentures of lease respectively reserved in respect

That all new erections, and stock, &c. shall be valued, and [B. B.] shall pay or secure one sixth of such valuation to [A. A.]

That a rest has been made in the books and the leases valued.

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of the said several premises, makes the sum of £——, which it is hereby agreed shall be paid by the said copartnership trade to the said [A. A.] yearly during the continuance thereof, by equal half yearly payments, as a rent for the said several premises in and upon which the said copartnership trade is to be carried on as aforesaid: AND WHEREAS, in further pursuance of the hereinbefore mentioned agreement, an inventory, estimate, and valuation have been made by competent and indifferent persons named for that purpose by the said [A. A.] and [B. B.] of the said new erections and buildings, repairs, alterations, and improvements, and of the goodwill of the said trade, and of all the engines, machinery, implements, utensils, goods, wares, malt, hops, beers, ales, horses, drays, commodities, effects, and stock used and employed by him the said [A. A.] in the said trade or business of a brewer, and the same upon the estimate and valuation made thereof as aforesaid amounts to the sum of £——, (exclusively of all debts due and owing as well to as from or by the said [A. A.] in respect of the said trade or business); which said inventory, estimate, and valuation are entered into several books signed by them the said [A. A.] and [B. B.] respectively: AND WHEREAS the said [B. B.], being unable at present to pay the said one sixth part or share of the amount of the said valuation, hath requested the said [A. A.] to accept and take the bond of him the said [B. B.] with a warrant of attorney to confess judgment thereon, for securing the payment of £——, (being the amount of the said sixth part or share of the said valuation), together with interest for the same, after the rate of *5l. per cent. per annum*, which the said [A. A.] hath consented to do accordingly: AND WHEREAS, by a certain bond or obligation in writing, under the hand and seal of the said [B. B.], bearing even date with these presents, he the said [B. B.] hath become bound to the said [A. A.], his executors, administrators, and assigns, in the penal sum of £——, with a condition thereunder written for making void the same on payment *by the said [B. B.], his heirs, executors, or administrators, of the sum of £——, together with interest for the same, after the rate of *5l. per cent. per annum*, in manner and at the times in the said condition of the said bond mentioned: And for the better and more effectually securing the

Amount of rent to be paid annually to [A. A.]

That the new erections and stock in trade have been valued at £——.

And that [B. B.'s] one-sixth part of such £—— shall be secured by his bond and warrant of attorney.

Recital of bond.

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Of warrant of attorney.

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payment of the said sum of £——, with interest, as in the said condition of the said bond mentioned, the said [B. B.] hath, by a warrant of attorney or writing under his hand and seal, also bearing even date with these presents, duly authorized certain attornies of his Majesty's Court of King's Bench at Westminster, therein named, jointly and severally, or any other attorney of that Court, by confession or otherwise, to suffer judgment to be entered up in the same Court in an action of debt upon the said bond, at the suit of the said [A. A.], for the said sum of £——, and costs of suit (*a*): NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, he the said [A. A.] *Hath* bargained, sold, assigned, transferred, and set over, and by these presents *Doth* bargain, &c. (*b*) unto the said [B. B.], his executors and administrators, one full sixth part or share (the whole into six parts to be divided), of and in all and singular the said new erections and buildings made by the said [A. A.] in and upon the said several premises comprised in the said several recited indentures of *lease respectively, and of and in all repairs, alterations, and improvements done and made in and upon the said premises; and also of and in the goodwill of the said trade or business of a brewer so carried on by the said [A. A.], and of and in the machinery, implements, utensils, goods, wares,

Testatum.

Assignment by [A. A.] to B. B.] of the one-sixth of the new erections, and the stock, &c.

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As to taking a bond and judgment as a security.

(*a*) The practice of taking a bond, and a warrant of attorney to confess judgment on the bond, which seems to have been adopted in this instance, is not unfrequent. But the bond in such a case is wholly unnecessary, the warrant of attorney alone being for every purpose equally effectual. It is, indeed, often advisable to take a bond, and also a judgment separately, but then the judgment is not entered up on the bond; and consequently the creditor may, if he thinks proper, instead of availing himself of his judgment, bring an action on the bond, which of course he cannot do if judgment has been entered up on the bond.

(*b*) Though in this case the share to which the in-coming partner was admitted was assigned to him, yet such an assignment seems to be unnecessary. It is sufficient to declare that the property in question shall be part of the joint stock, and that the partners shall be entitled to it in certain proportions; and the plan of assigning the share seems to be objectionable, where a large sum is paid as a premium, as the deed would be subject to an *ad valorem* duty on the consideration-money as a purchase.

malt, hops, beers, ales, horses, drays, commodities, effects, and stock, of what nature or kind soever, in and upon the said several premises employed and used in carrying on the said trade or business (as the same are respectively mentioned and comprised in the said inventory, estimate, and valuation thereof made as aforesaid) (*c*): To HAVE AND TO HOLD the said one full sixth part or share hereby assigned, or intended so to be, of and in the said new erections and premises, buildings, repairs, alterations, and improvements: and of and in the said goodwill, engines, machinery, implements, utensils, goods, wares, malt, hops, beers, ales, horses, drays, commodities, effects, and stock, and premises hereinbefore mentioned, unto the said [B. B.], his executors and administrators, as and for his and their own proper goods, chattels, and effects, subject, nevertheless, to the several provisions, conditions, and agreements hereinafter expressed in respect thereof: AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the said recited agreement, each of them the said [A. A.] and [B. B.], in consideration of the confidence and good opinion which he reposeth in and entertaineth toward the other of them, *Doth* for himself, his heirs, executors, and administrators, and as to and in respect of the several matters, acts, and things to be made, done, committed, and omitted by him, his executors and administrators, covenant and agree with the other of them, and the executors and administrators of such other, by these presents, in manner following, (that is to say):

BETWEEN TWO BREWERS.

Habendum.

Further *testatum.*

Mutual covenants by the parties.

THAT they the said parties hereto shall and will become and continue copartners together in the trade or business of a brewer in all things relating thereto, for the term of —— years, to commence from the day of the date of these presents, if they the said parties hereto shall so long live, determinable, nevertheless, as hereinafter mentioned.

To carry on the business of a brewer in copartnership for —— years,

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THAT the said joint trade, and all buyings and sellings, and all things relating thereto, shall be managed, exercised, and carried on in the name, style, and firm of [A. A.] and [B. B.] (*d*), in and upon the said brewhouse, and the said

under the firm, &c., upon the present or other premises.

(*c*) The inventory, if referred to, should be added as a schedule to the deed, because a separate stamp is then unnecessary.

(*d*) Where partners stipulate that the firm shall be A., B., and C., it is

As to neglect to

BETWEEN TWO BREWERS.

several premises wherein the said [A. A.] hath for many years past carried on the trade or business of a brewer, in ——; or in such other place or places as the said parties hereto shall hereafter from time to time during the said copartnership, by mutual consent, provide for that purpose.

Shares in capital.

That the said sum of £—— shall be the capital stock or fund for carrying on the said joint trade, and that five sixth parts or shares of and in the said capital stock or fund, (the whole into six parts to be divided), amounting to the sum of £——, shall belong to the said [A. A.], and the remaining one-sixth part or share thereof, amounting to the sum of £——, shall belong to the said [B. B.].

Profits and losses.

That the gains and profits which shall be made in or by the said joint trade, and all losses attending the same, (except such as are hereinafter mentioned), shall be divided between and borne by the said parties hereto in the proportions aforesaid.

The lease to belong to [A. A.], who shall be allowed a certain rent.

That the said several recited indentures of lease shall continue and be the sole property of the said [A. A.], and that the said [A. A.] shall be paid by the said copartnership during the continuance thereof, or during so long as the said joint trade shall be carried on in the premises comprised therein, the said yearly rent of £——, by equal half yearly payments, on the — day of ——, and the — day of ——, in every year: That all other rents, and all taxes, and

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*repairs, and the premiums of insurance against fire, payable on account of the tenements wherein the said copartnership business shall for the time being be carried on, and the salaries and wages of all clerks, servants, and workmen employed in the said copartnership business, and all charges

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use the proper partnership name.

a breach of the covenant for any partner to subscribe an instrument falling within the scope of the covenant, in the name of A. *and Co.*, or to sign his own name, adding "for self and partners;" the object of such covenant being that each individual shall have the credit which belongs to his name, and shall not be exposed to consequences that might arise from his name not being used. But the Court of Chancery will not grant an injunction against a party infringing a covenant of this nature, unless there is a studied, intentional, prolonged, and continued inattention to the application of one party calling upon the other to observe this article of their contract. See *Marshall* v. *Colman*, 2 Jac. & Walk. 269.

and repairs attending the said copartnership business, shall be borne and paid out of the said joint stock and the profits thereof.

All securities to be taken in the joint names.

THAT all mortgages, leases, bonds, specialties, and securities, and all other writings whatsoever, which shall at any time or times hereafter during the continuance of this copartnership be had, made, or taken for any houses, warehouses, storehouses, vaults, cellars, or other premises, money, debts, or other matter, cause, or thing whatsoever, in anywise concerning the said joint trade, shall be made and taken in the names of both of them the said parties hereto.

Partners to be faithful, &c.

THAT they the said parties hereto will be true and just to each other in all accounts, dealings, and transactions relating to or concerning the said copartnership trade, and shall not wittingly or willingly commit or suffer any act or default whatsoever, whereby the said joint trade or stock, or any part thereof, or the said copartnership business, shall be in any respect diminished or deteriorated.

As to getting in debts owing to [A. A.]

THAT each of them the said parties hereto shall and will give his best assistance in getting in, as well the debts now owing to the said [A. A.], as all the debts which shall hereafter be owing or belonging to the said copartnership trade, or to the said parties hereto in respect thereof.

[B. B.] wholly to employ himself, but [A. A.] may decline to do so.

THAT the said [B. B.] will at all times, during the continuance of the said copartnership, devote his whole time and attention in the usual hours of business, and use his utmost endeavours in managing and carrying on the said trade, according to the intent and meaning of these presents; but the said [A. A.] shall be at liberty at any time during the continuance of the said copartnership to decline such part of the active management of the said joint trade as he may think fit.

To consult each other.

THAT each of the said parties hereto will consult and advise with the other of them concerning his purchases, sales, receipts, payments, and dealings in and *relating to the said joint trade, from time to time, as occasion shall require.

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Neither to buy or sell above a certain extent without consent;

THAT neither of them the said parties hereto will at any time during this copartnership purchase, sell, or deliver, or make any contract for the purchase, sale, or delivery of any goods, wares, merchandizes, or effects, on account of or be-

BETWEEN TWO BREWERS.

longing to the said joint trade, above the amount or value of £—— without the consent of the other of them; and neither of them will, during the continuance of the said copartnership, trust or give credit to any person or persons whomsoever, contrary to any intimation that shall have been before given to him in writing by the other party, on pain of being charged with and liable to make good to the said joint stock, out of his the offending party's share, all such losses, damages, and expenses as the said joint trade or stock shall sustain by reason of such purchase, sale, or delivery, or contract for the purchase, sale, or delivery of such goods or effects without such consent, or by reason of such credit being given as aforesaid, contrary to such intimation as aforesaid.

nor to give credit after intimation not to do so.

THAT neither of them the said parties hereto will, during the continuance of the said copartnership, release any debt or demand due or belonging to the said joint trade, or accept for the same less than shall be really due, the usual abatement and allowance, according to the custom of the said trade, only excepted; nor shall or will release or discontinue any action or suit to be brought for any such debt or demand, without the consent in either case of the other of them, on pain of being compelled to make good out of his (the offending party's) share of and in the said joint stock, and the profits thereof, the amount or value of the loss occasioned thereby.

Not to release any debts, &c. or discontinue any action without consent.

THAT he the said [B. B.] shall not, during the continuance of this copartnership, directly or indirectly, be concerned in or follow the business of a brewer, or any other trade, art, business, or employment whatsoever, either alone, or in company with, or as agent to, or in the name or names of, any other person or persons, unless the same be done with the full consent of the said [A. A.], to *be given and signified in writing for that purpose; but it is also agreed, and clearly and distinctly understood by and between them the said [A. A.] and [B. B.], that he the said [A. A.] shall be at liberty, during the continuance of this copartnership, to carry on and be concerned in, and follow, upon his own separate account, at any place or places he may think proper, the business of a brewer, or any other art, trade, business, or employment which he the said [A. A.]

[B. B.] not to be concerned in any other business without consent.

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But [A. A.] may.

may now be engaged or concerned in, elsewhere than as aforesaid, or which he may, at any time or times hereafter, during the continuance of this copartnership, be engaged or concerned in, either by himself, or together with or in the name or names of any other person or persons whatsoever.

Joint property not to be charged with separate debts.

That no part of the said joint stock, or the profits thereof, shall in any manner be subject to the payment of the private debts or incumbrances of either of them the said parties hereto.

Neither to become security for any third person without consent.

That neither of them the said parties hereto shall, at any time during the continuance of the said copartnership, become surety or bail for any person or persons whomsoever, by note, bill, bond, or in any manner howsoever, either in the copartnership's name, or otherwise, without the consent, in writing, of the other of them; and if any loss or damage shall happen to the said joint trade, by reason of any security already entered into by either of them the said parties hereto, or by means of either of them hereafter becoming bail or surety for any person or persons, without such consent as aforesaid, then such loss or damage shall be borne exclusively by such party.

Any consequent loss to be borne by the offending party out of his share.

Apprentices not to be taken without mutual consent.

That no apprentice shall be taken by either of them the said parties hereto without the consent of the other of them; and that every apprentice who shall be so taken, shall be employed in the said joint trade; and that every premium which shall be received with any such apprentice shall be brought into the said copartnership stock; Provided always, nevertheless, that it shall be lawful for the said [A. A.], at any time during this copartnership, to take any one or more of his sons as an apprentice or apprentices to him in the said business of a brewer, without being *liable to pay or account to the said copartnership trade for any premium in respect thereof.

Apprentice fees to become copartnership property.

But [A. A.] may take his sons as apprentices without any premium.

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Neither to hire, &c. clerks, &c. without consent, except in certain cases.

That no brewer, clerk, or other servant, shall, during the continuance of this copartnership, be hired into, or discharged from, the service of the said copartnership, by either of the parties hereto, without the written consent of the other of them; except that the said [A. A.] shall, from time to time, and at all times during the continuance of this copartnership, be at liberty to hire and engage, as principal brewer,

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principal counting-house clerk, and principal broad clerk, such person or persons as he may think fit, and to dismiss any such person or persons, without consulting with, or obtaining the consent of, the said [B. B.] to any such hiring or dismissal; provided that every such brewer, or counting-house or broad clerk, so to be hired and engaged as last aforesaid, shall, if required, give security to the said copartnership for his integrity and fidelity during his respective service.

Either may advance money to the capital, and withdraw it on three months' notice.

THAT it shall be lawful for either of them the said parties hereto, with the consent in writing of the other of them, during the continuance of the said copartnership, to advance unto and bring into the said joint stock or trade any sum or sums of money, for better carrying on the said joint trade; and, and at any time or times afterwards, of the free will of the party having so brought in the same, and giving three calendar months' notice in writing in that behalf to the other of them, or entering such notice in the copartnership ledger, to withdraw from the said copartnership business the sum or sums of money so advanced by him, or any part thereof;

Such advanced money to bear interest as a debt.

And if either of them the said parties hereto shall so lend or advance any such sum or sums of money, the same shall be immediately entered in the said copartnership books as a debt owing to the party lending or advancing the same, who shall be entitled, during the continuance thereof in the copartnership business, to interest thereon at and after the rate of *5l. per cent. per annum.*

Neither to withdraw for his private use any joint money, except as after mentioned.

THAT neither of them the said parties hereto shall, during the continuance of this copartnership, convert or employ any part of the said joint stock or effects, or *withdraw or take out of the said copartnership business any sum

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or sums of money for his or their own private use, except the weekly sums hereinafter mentioned, and interest at and after the rate of *5l. per cent. per annum* on his share in the capital stock of the said copartnership trade, such interest to be drawn out half yearly, as hereinafter is mentioned;

But if such shall be done, interest to be paid.

but if, contrary to this stipulation, either of the parties hereto shall appropriate or withhold, for his separate use, any sum or sums of money, stock, or effects, of or belonging to the said joint trade, that then such party shall allow and pay to the said copartnership interest for the said stock,

effects, or monies, after the rate of 5*l.* for every 100*l.* by the year, for the time or times that the said stock, effects, or monies shall be owing to the said joint trade, and the other party shall be at liberty to deduct the value of such stock or effects so withdrawn, or such sum or sums of money so owing, with the interest thereon, out of the share or shares of the party so owing the same, at the next general rest or balance of the accounts of the said copartnership, to be made in manner hereinafter mentioned.

Each to take certain weekly specified sums.

THAT it shall be lawful for the parties hereto respectively, on the first day of every week, to receive and take out of the said joint stock, for their own respective use, the sums of money hereinafter mentioned, that is to say, the said [A. A.] the sum of £——, and the said [B. B.] the sum of £——.

Each to take interest on his share of the capital half yearly.

THAT it shall be lawful for the said parties hereto to receive and take out of the said joint stock by equal half-yearly payments, on the —— day of ——, and the —— day of ——, in every year during the continuance of the said copartnership, interest after the rate of 5*l.* for every 100*l.* by the year, on their respective shares in the capital of the said copartnership.

Proper books to be kept, in which all receipts and payments, purchases and sales, to be entered.

THAT there shall be provided, at the expense of the said copartnership, proper books of account, wherein each party shall duly enter, or cause to be entered, from time to time, true and exact particulars of all sums of money received and paid, and all malt, beer, and other goods, wares, and things bought, made, sold, received, or delivered, and other acts done on account of the said copartnership, *by him, or with his privity: And that the said books of account, and all securities, bonds, bills, notes, and other papers and writings belonging to or concerning the said joint trade, shall be kept in the counting-house, or some other safe place on the premises where the said joint trade shall for the time being be carried on, and shall not be removed from thence by either of the said parties hereto without the consent in writing of the other of them; and each of them the said parties hereto, his respective executors or administrators, may at all times, as well during the continuance as after the expiration of this copartnership, have free access to the said books, papers, and writings, to peruse and exa-

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The same and all securities to be kept in the counting-house.

Not to be removed without consent.

Each partner to have free access to the books.

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mine the same, and to take copies thereof, or extracts therefrom, at his or their respective pleasure, without the hindrance or denial of the other of the said parties, his executors or administrators.

[A. A.] to be cashier.

THAT the said [A. A.], if he shall think proper, shall, during the continuance of this copartnership, be the cashier thereof.

Cash to be balanced weekly, and paid into the bankers.—Cheques to be drawn only by [A. A.]

THAT the cash account of the said joint trade shall be settled and balanced once in every week during the continuance of this copartnership, and the balance of the cash in hand, on every such weekly settlement, shall be paid in the name of the said copartnership firm into such bankers as may be mutually agreed on as the copartnership bankers; the same, nevertheless, to be drawn out for the purposes of the said copartnership only by drafts or cheques to be signed by the said [A. A.] in the name of the said copartnership.

Each partner to make good any loss occasioned by his negligence, &c.

THAT if, at any time during the continuance of this copartnership, any loss or damage shall happen to the said joint stock by the fraud or negligence of either of the said parties, then the party by or through whom such damage or loss shall happen, shall make good the same within three calendar months next after the discovery thereof.

Each to account for money received, &c.

THAT each of the said parties will immediately bring and pay into the joint stock or cash of the said copartnership all such monies as he shall receive on account thereof; and that the sums of money so to be received shall from time to time be applied in discharge of the debts that shall be due from the said joint trade.

Allowance for treating customers.

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*THAT each of them the said parties hereto shall be allowed, out of the said joint stock, all sums of money which he may expend in treating any of the customers of the said copartnership, provided the same shall be claimed and brought to account, and entered in the expense or other proper book of this copartnership, within seven days next after the expenditure thereof, but not otherwise.

A general rest or balance to be made annually.

THAT the said parties hereto shall, on the —— day of —— in every year, or within fourteen days next thereafter, join in making up a general account, valuation, and balance, as well of all monies, credits, stock, and effects due, owing, or belonging to the said joint trade, or to the said parties

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hereto, or either of them, on account and for the use of the same, as also of all debts and sums of money due or owing by or from the said joint trade or copartnership, and also of and concerning all losses and gains incident to the said joint trade; And that, upon perfecting every such yearly general account, valuation, and balance, the same shall be transcribed into two books, whereof each of them the said parties hereto shall have one for his own proper use, mutually subscribed by both of them; and in case of the decease of either of them during the continuance of this copartnership, the part or share of such deceased partner in the said stock and gains, at the time of the then next preceding general account, valuation, and balance so stated, adjusted, and subscribed, shall or may be considered as fixed and ascertained thereby, and shall not at any time afterwards be opened or controverted, unless some manifest error or errors, to the amount of £—— or upwards, shall be found therein; and in every such case merely such error or errors shall be corrected, and not the whole account opened.

To be transcribed into two books, to be signed by both: —one book to be delivered to each partner; and in case of either's decease, his share to be ascertained thereby.

That the first of the said general accounts or balances shall be made up, stated, and signed on the —— day of —— next ensuing the day of the date hereof, or within fourteen days next thereafter.

First rest.

That the residue of the net clear profits and gains, which, by every such annual account as aforesaid respectively, shall appear to have arisen by reason or on account of the said joint trade (as shall remain after deducting thereout the amount of the said weekly sums to be drawn out by them *the said parties hereto, and also deducting thereout the amount of the said interest of the said capital stock so taken, and to be drawn out by them half-yearly as aforesaid) shall yearly be divided between the said parties hereto, in the proportions hereinbefore mentioned; or the said profits or gains shall be employed and continued for the more advantageously carrying on the said joint trade and copartnership in such manner as they the said [A. A.] and [B. B.] may mutually agree on (*e*): Provided always, that if they the

Residue of the profits (after the weekly sums) to be divided or added to capital as may be agreed on.

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Such residue to

(*e*) This seems to be better than an absolute stipulation to divide the profits, which is commonly inserted, but which, it is obvious, it may be found very inconvenient to act upon.

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be drawn out at one, two, and three months.

said [A. A.] and [B. B.], or either of them, shall, on such yearly rest and balance being made, determine to draw out from the said joint trade and copartnership such residue of the said profits and gains thereof, the same shall be drawn out by three equal instalments at one, two, and three months from the day of such general rest and balance being made, and not sooner.

[B. B.] to reside in the house rent free,

THAT the said [B. B.] shall be at liberty, during the continuance of this copartnership, to reside in the dwelling-house upon the said premises where the said joint trade is to be carried on, without being subject or liable to pay any rent or taxes in respect thereof (*f*): And that he the said [B. B.] shall, as such resident partner, be provided, at the expense of the said joint trade, with all such strong beer, coals, and candles, as he and his family may use and consume in the said dwelling-house.

and have coals, &c.

[A. A.] to have a particular room therein.

THAT he the said [A. A.] shall, during the continuance of the said copartnership, have for his own exclusive use the room over the counting-house of the said joint trade, with free egress and regress thereto and therefrom, without being liable to pay any rent or taxes in respect thereof (*g*); And that he the said [A. A.] shall be provided, at

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And to have beer, &c. at copartnership expense.

*the expense of the said joint trade, with all such strong beer, coals, and candles, as he and his family may, during the continuance of this copartnership, use and consume in his present or any future dwelling-house; the same to be delivered at such dwelling-house at the expense of the said copartnership, provided the same be within the distance of two miles from the gate of the brewhouse and premises in which the said joint trade shall, for the time being, be carried on; but, otherwise, the expense of the delivery thereof to be borne by the said [A. A.]

On dissolution by effluxion of time or by no-

THAT the parties hereto shall and will, immediately on the dissolution of this copartnership, whether the same be

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(*f*) It should be added, if so intended, as disputes sometimes arise upon the point:—

"but shall, at his own expense, keep the same, during such his occupation, in good and tenantable repair."

(*g*) "but keeping the same in good and tenantable repair."

dissolved by effluxion of time, or by virtue of any notice to be given in pursuance of the proviso hereinafter contained, or within thirty days next after such dissolution, meet together and join in making up a final account of all the joint stock, money, goods, and effects then belonging to the said joint trade, and of all credits and debts then due and owing unto and from the same; And, after such account shall be so made up, the erections, buildings, repairs, and improvements, comprised in the inventory and valuation made previously to the commencement of this copartnership, and hereinbefore mentioned, and all other erections, buildings, repairs, and improvements to be hereafter made, and built in and upon the said several premises comprised in the said hereinbefore recited indentures of lease respectively, or in or upon any other premises of which the said joint trade and copartnership may, at any time hereafter, during the continuance thereof, become possessed; and the good-will of the said joint trade, and the engines, machinery, implements, utensils, goods, wares, horses, drays, commodities, effects, or stock, of what nature or kind soever, then employed and used in carrying on the said joint trade, shall be valued by two proper persons, to be named by the said parties hereto respectively; and the said [A. A.] shall be at liberty, if he be desirous so to do, to take on himself the whole of the said joint trade; and, in case he the said [A. A.] shall determine so to do, then that he shall pay to the said [B. B.] his executors or administrators, one-sixth part of the amount of the valuation so to be made as aforesaid, by equal instal-
*ments, at three, six, nine, and twelve calendar months, and shall give his bond, in a sufficient penalty, for securing the payment thereof, with interest, on each instalment respectively, and after the rate of *5l. per cent. per annum; but, nevertheless*, in case the said [B. B.] shall then be indebted to the said [A. A.] on account of the said hereinbefore recited bond, then the said [A. A.] may, in the first place, deduct such debt out of the said sixth part or share of the amount of such valuation, so to be secured as aforesaid: And that, upon the execution and delivery of such bond, the said [B. B.] shall and will, upon the request, and at the costs of the said [A. A.], his executors or administrators, execute to

tice, partners to make a general rest.

A valuation of the new erections, stock, &c. to be made.

[A. A.] to be at liberty to take the whole.

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If so, to pay one-sixth of the valuation by instalments to [B. B.], with interest, to be secured by [A. A.'s] bond. Any debt due to [A. A.] to be deducted.

[B. B.] to execute assignment.

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him or them such deeds or assurances as shall be requisite, for the purpose of vesting in the said [A. A.], his executors or administrators, the said [B. B.'s] share of and in the said joint stock, and the produce thereof.

Good-will, &c. to be valued in a prescribed manner.

THAT, at the dissolution of the said copartnership, in manner last aforesaid, the valuation of the good-will of the said trade, and of the beers, ales, malt, hops, and coals then belonging to the said copartnership, shall be made in manner following; that is to say, the good-will of the said trade shall be estimated after the rate of 250*l.* for every thousand barrels of strong beer, which shall yearly, on an average of the three years then last past, have been brewed on account of the said joint trade; the stock of beer and ales then belonging to the said copartnership shall be estimated at the then net selling price thereof, making and allowing an abatement or deduction at the rate of 16*l.* 13*s.* 4*d.* for every 100*l.* on the whole amount of the valuation of the said beer and ales; the stock of malt, hops, and coals then belonging to the said joint trade shall be estimated at the price or prices at which the same respectively were purchased, as such price or prices shall appear by the books of the said copartnership; and the valuation of all other the buildings, improvements, engines, machinery, implements, utensils, and stock, of what nature or kind soever, then belonging to the said copartnership, in regard to the principle or manner of making the same, shall be in the discretion of the persons to be chosen for the purpose of valuing the same as aforesaid.

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[A. A.] to receive and pay all debts.

THAT, on the dissolution of the said copartnership, by the means aforesaid, the credits then owing to the said copartnership shall be collected by the said [A. A.], and applied by him in discharge of the debts thereof, and the said [A. A.] shall, if required, give his bond, in a reasonable penalty, conditioned for applying the monies so to be received by him, in the first place in discharge of such debts, and then in payment to the said [B. B.], his executors or administrators, of the share and proportion of him the said [B. B.] of and in the said credits: [And also for indemnifying the said [B. B.], his executors and administrators, from all incumbrances, debts, demands, costs, charges, damages,

And enter into a bond so to do.

And to pay [B. B.] his share of the balance.

And to indemnify [B. B.] from all incumbrances, &c.

and expenses any way arising, or to arise, from, or on account of, or by reason of, the said copartnership (*h*).] BETWEEN TWO BREWERS.

THAT, at the end of one year from the dissolution of the said copartnership trade, by the means aforesaid, the credits thereof then remaining unreceived by the said [A. A.] *as aforesaid, shall be valued by two indifferent persons, to be chosen by the said parties respectively; and the said [A. A.] shall pay to the said [B. B.], his executors or administrators, one-sixth part or share of the amount of such valuation; on which payment being made, he the said [B. B.], his heirs, executors, or administrators, shall relinquish all right and claim to any part or share in the said credits, or the produce thereof, and shall and will, upon the request, and at the costs of the said [A. A.], his executors or administrators, by sufficient deeds or assurances, effectually assign or release all right, title, interest, claim, and demand whatsoever, therein or thereto, to the said [A. A.], his executors and administrators, and shall and will give him and them full power and authority to sue for, recover, and re-

At expiration of a year, copartnership credits to be valued.

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On payment to [B. B.] of one-sixth of valuation, he is to assign his interest.

(*h*) The reason for the clause within brackets is not very apparent, for, if the dissolution of the partnership were properly announced, (as to which *vide ante*, p. 28), B. B. could not be liable for debts subsequently contracted by A. A.; and, as to the responsibility to be incurred in actions to be brought by A. A., in their joint names, for the recovery of the partnership credits, as B. B. was to participate in the benefit, it seems to be fair, that he should share also in the risk. In such a case, however, it may be proper to provide, that the partner to whom the collection of the credits is entrusted on their joint account, shall not bring any action without the consent of the other of them, thus:—

"Provided, nevertheless, that the said [A. A.] shall not, in the exercise of his said power to collect and receive the credits owing to the said partnership, bring any action or suit at law or in equity, in the joint names of himself and the said [B. B.], for the recovery of any of such credits, without the previous consent, in writing, of the said [B. B.]; and that, if the said [A. A.] shall bring any such action or suit without such consent, the same shall be at his own exclusive risk; and the said [B. B.] shall not be liable to contribute any share or proportion to the damages and expenses occasioned thereby."

Collecting partner not to bring actions without the consent of the other.

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ceive all and every or any of the said credits, in the name of the said [B. B.], or by any other lawful means whatsoever, as by the said [A. A.], his executors or administrators, shall be reasonably required; and shall and will, in such deeds or assurances, enter into a covenant with the said [A. A.] not to revoke such power or authority, or interfere with the receipt or collection of the said credits, or any of them; and, after such assignment being made, and such power being given, each of them the said [A. A.] and [B. B.], his executors and administrators, shall, if required so to do by the other of them, his executors or administrators, give and execute to the other of them, his executors and administrators, a general release of all claims and demands whatsoever, relating to or in any ways concerning the said joint trade and copartnership; and the said [A. A.] shall, at his own costs, give to the said [B. B.] his bond, conditioned to indemnify him, his executors and administrators, against all costs, charges, and expenses, which may happen, or be occasioned, to the said [B. B.], his executors or administrators, by reason of any action or suit which may be brought by the said [A. A.] in the name of the said [B. B.], by virtue of the power or authority to be given to him as aforesaid.

[A. A.] to give bond of indemnity to [B. B.]

Each party to have access to the books for one year after the dissolution.

THAT at the dissolution of the said copartnership in manner aforesaid, all the books of account, papers, and writings belonging thereto, shall be placed and left in the counting-house of the said copartnership, so that each of them

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*the said [A. A.] and [B. B.] may have the use and inspection thereof, and free access thereto, when he shall think fit, thenceforth during the period of one year, (at the end whereof the credits then due to the said joint trade will be valued and assigned to the said [A. A.] in manner aforesaid); and the said [B. B.], his executors or administrators, shall not nor will intermeddle with, receive or release any of the said credits, but shall and will from time to time during the said period of one year, upon the request of the said [A. A.] his executors or administrators, execute and give to him and them sufficient powers and authorities, and concur in all requisite acts, for enabling him to recover and receive the said credits of the said copartnership.

During the year [B. B.] to give [A. A.] all necessary powers to collect debts.

If [B. B.] die,

THAT in case the said [B. B.] shall happen to die at any

time during the continuance of this copartnership, an estimate and valuation shall, within thirty days next after such death (*i*), be made of all the erections, buildings, improvements, engines, machinery, implements, utensils, goods, wares, stock, and effects belonging to the said joint trade, in like manner as is hereinbefore directed in case of the expiration of the said copartnership by effluxion of time, or in pursuance of a notice to be given for the determination thereof; And that the credits due and owing to the said joint trade shall be collected and received by the said [A. A.] without the interference of the executors or administrators of the said [B. B.]; And that the said [A. A.] shall and will pay or cause to be paid unto the executors or administrators of the said [B. B.] his the said [B. B.'s] full share of the amount of such estimate and valuation, by four equal instalments, at three, six, nine, and twelve calendar months from the time of such his decease; And also his the said [B. B.'s] share of the produce of all and every the credits then due and owing to the said copartnership, after full payment and discharge of all the debts owing from the said copartnership, as and when the same credits shall be received, in like manner as *is hereinbefore provided in case of the determination of the said copartnership by effluxion of time, or in pursuance of a notice to be given for the determination thereof, together with interest for such share of him the said [B. B.] of and in the said joint stock, at and after the rate of 5*l. per cent. per annum* from the time of his decease as aforesaid; And also that he the said [A. A.] shall and will, within the space of one calendar month next after the decease of him the said [B. B.], (at the costs of the said [A. A.]), execute and deliver to the executors or administrators of the said [B. B.] a bond in a reasonable penalty, with a condition for keeping indemnified the executors or administrators of the said [B. B.] from all costs, damages, and expenses arising or to arise from or on account or by reason of the said joint trade and copartnership; And to the intent that the executors or administrators of the said [B. B.] may have as little

valuation to be made of the new erections, stock, &c.

Credits to be collected by [A. A.]

[A. A.] to pay to the executors or administrators of [B. B.] his share of the amount of the valuation.

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With interest on [B. B.'s] proportion, from his death.

[A. A.] to indemnify [B. B.'s] executors from the debts, &c. of the copartnership.

[B. B.'s] net share of joint stock to be se-

(*i*) This provision was, in the draft from which this precedent was taken, extended to bankruptcy; but as its validity for such a purpose is extremely questionable, (*vide ante*, p. 31), that part of the clause is omitted.

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cured by [A. A.'s] bond;

trouble as possible, the said [A. A.] shall likewise, within one calendar month next after the decease of the said [B. B.] as aforesaid, duly execute and deliver to such executors or administrators a bond in a proper penalty, conditioned for the payment of the amount of the net part or share of him the said [B. B.] of and in the said joint stock, according to the valuation thereof, to be made in manner aforesaid, together with such interest as aforesaid; And also for the payment of his the said [B. B.'s] share of the produce of the credits of the said copartnership, after payment of the debts owing therefrom, in such manner, and at such times, as is hereinbefore appointed for the payment thereof respectively: Nevertheless, it is expressly declared and agreed, that in case, at the time of his decease, the said [B. B.] shall be indebted to the said [A. A.], either on account of the said hereinbefore recited bond or otherwise, then the said [A. A.] shall have full power and authority to deduct such debt out of his the said [B. B.'s] said share in the said joint stock, and the profits and credits thereof, to be secured as aforesaid.

also of the credits.

In case of the death of [B. B.], [A. A.] to deduct from [B. B.'s] share any debt due to [A. A.]

On execution of the bonds, the executors to release all claims to the joint stock, &c.

THAT from and after the execution of the said bond to be given by the said [A. A.] as aforesaid, the executors or administrators of the said [B. B.] shall not nor will make any claim or demand to any part or share of or in the said joint stock or trade, or the produce thereof, or any credits *or effects belonging thereunto or arising therefrom; but on the contrary shall and will, on the request and at the costs of the said [A. A.], assign, release, and discharge all right, title, interest, claim, and demand whatsoever therein or thereto to the said [A. A.], his executors, administrators, and assigns; and shall and will give him and them full power and authority and assistance for and towards the suing for, recovering, and receiving of all or any of the said credits, by permitting their names to be made use of, if necessary, or by such other lawful means as by the said [A. A.], his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably required: And the said [A. A.] shall, at his own costs, execute and deliver to the said executors or administrators of the said [B. B.] a bond in a sufficient penalty, conditioned to indemnify them against all costs, damages, and expenses which they may sustain or be

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[A. A.] to indemnify executors.

put unto by reason of any action or suit which may be brought by the said [A. A.] in their names by virtue of the power so to be given to him as aforesaid.

THAT if, upon the determination of the said copartnership, whether the same happen by effluxion of time or by virtue of a notice to be given for the determination thereof, or by the death of the said [B. B.], the said [A. A.] shall decline to exercise the option and choice hereinbefore given to him of taking upon himself the whole of the said trade, and of purchasing the share of the said [B. B.] therein, then they the said [A. A.] and the said [B. B.], his executors or administrators, shall and will at such determination of the said copartnership, or within thirty days next thereafter, meet together and join in making up and perfecting in writing a final account of all the joint stock, money, goods, effects, and other things then belonging to the said joint trade or copartnership, and of all credits and debts then due and owing unto and from the same; And that after payment and satisfaction, or providing for the payment and satisfaction, of all the debts that shall be then owing by and from the said copartnership, they the said parties, their executors or administrators, shall and will sell and dispose of all and every the goods, wares, engines, machinery, implements, utensils, stock, and *effects, of what nature or kind soever, belonging to and used in the said joint trade, either by public or private sale, as they the said [A. A.] and [B. B.], their executors or administrators, shall agree on; and shall divide between themselves the money arising from the said sale or sales, and all the said credits then remaining due and owing to the said joint trade, according to their respective shares, regard being had and credit given by either party, his executors and administrators, for any money or claims due or owing by him or them respectively to the said copartnership business: Provided always, that such sale or sales shall not prejudice, injure, or damnify the interest which the said [A. A.] now has, or may at any time hereafter have, in or to the premises comprised in the said several hereinbefore recited indentures of lease: And in case the said [B. B.] shall then stand indebted to the said [A. A.] on account of the said hereinbefore recited bond or otherwise, or to the said copartnership stock, or the cash thereof,

In case [A. A.] declines to purchase [B. B.'s] share, a general rest to be made.

And stock in trade to be sold.

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And produce divided; Also the credits to be divided.

Such sale not to affect [A. A.'s] interest in the leases.

[A. A.] to deduct out of [B. B.'s] share thereof any debt [B. B.] may owe him.

BETWEEN TWO BREWERS.

then he the said [B. B.], his executors or administrators, shall not have liberty to take to himself or themselves the share of him the said [B. B.] of and in the said stock and effects until such debtor debts shall be fully paid.

If [A. A.] die, his executors or administrators to have the right of taking to the business solely.

THAT in case at any time during the continuance of this copartnership the said [A. A.] shall depart this life, the executors or administrators, or executor or administrator, of the said [A. A.] shall be at liberty, if they or he shall think proper, to take upon themselves or himself the whole of the said joint trade, and to purchase the share of the said [B. B.] therein, or otherwise to dispose of the said trade, and the stock and effects thereof, in like manner as the said [A. A.] is hereinbefore empowered to do in case the said copartnership shall cease by effluxion of time, or by any other the means hereinbefore mentioned.

[B. B.] not to assign or charge his share of the copartnership stock, &c. without consent.

If he do so, copartnership to cease as if regularly expired.

THAT in case the said [B. B.] shall at any time during the continuance of this copartnership assign or dispose of his share of and in the said joint stock and trade, or any part thereof, to any person or persons whomsoever, or otherwise charge or incumber the same, without the previous consent in writing of the said [A. A.], then the said copartnership shall from the time of his so *assigning, charging, or incumbering the same, stand dissolved and be at an end, in like manner, and with the same provisions and arrangements consequent on such dissolution, as if the same had ceased by effluxion of time (*k*): But, nevertheless, it shall be lawful for the said [A. A.] at any time during the continuance of this copartnership, at his own free will, and without the consent of the said [B. B.], to assign and transfer his share in the said joint stock and trade, and the profits thereof, or any part thereof, to any one or more of his the said [A. A.'s] children, or to any other person or persons whomsoever.

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But [A. A.] to be at liberty to assign his share.

Neither partner to enter into any recogni-

THAT neither of them the said [A. A.] and [B. B.] shall at any time during the continuance of this copartnership,

(*k*) According to the construction which has obtained in regard to similar clauses in leases, (*vide ante*, Vol. 4, p. 360), it should seem, that the dissolution would not absolutely take place on this event, but only at the option or election of the other partner. It would be better, therefore, in framing the clause, in order to prevent all question, expressly to make an act of such partner necessary for this purpose.

without the previous consent in writing of the other of them, on any pretence, become bail, or enter into any statute or recognizance for any person or persons whomsoever, or separately make, give, accept, sign, or execute any bill of exchange, promissory note, guarantee, or instrument in writing, whereby the said joint stock or effects of the said copartnership may be affected, damnified, or made liable to answer or pay any sum or sums of money or goods for which the said joint trade shall not have received a valuable consideration; And that if either of them the said [A. A.] and [B. B.] shall so become bail, or enter into any statute or recognizance, or separately make, sign, accept, or execute any such bond, bill of exchange, promissory note, guarantee, or other instrument, whereby the said copartnership may be affected, damnified, or made liable to pay or answer any sum or sums of money or goods, for which the said joint trade shall not have received a valuable consideration, the party so making, signing, accepting, or executing the same, shall forthwith pay to the other of them, for every such bail, *recognizance, bond, bill, note, or other instrument, as much money as every such bail, recognizance, bond, bill, note, or other instrument shall be given, entered into, or made for the security or payment of (*l*).

zance, or become bail for any person, without consent; or sign bill, &c. for which the copartnership shall not have received a valuable consideration.

If either do so, he shall pay to the other a sum equal to the money secured by any such bill, &c.

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That in case either of them the said [A. A.] and [B. B.] shall be desirous to put an end to the said copartnership at any time during the continuance thereof, and of such his desire shall give to the other of them six months' notice at least, in writing, or shall leave the same notice at the counting-house of the said copartnership, then and in such case this copartnership shall, at the expiration of the said period of six months, cease and determine in like manner to all intents and purposes whatsoever as if the same had ended by effluxion of time (*m*).

Power to either to determine the copartnership on notice.

(*l*) Here, it will be perceived, the offence described in this covenant is followed simply by a liability to pay the sum in question, and does not invest the other partner with the power of dissolving the partnership, as in most of the former precedents. Such a power, indeed, is obviously less required, where either party is authorized generally to dissolve the partnership by notice, as in the present case.

(*m*) It is a peculiarity in this case, that though the partnership is made

BETWEEN TWO BREWERS.

That [A. A.'s] executors or administrators (on his death) will indemnify [B. B.] generally.

THAT in case the said [A. A.] shall at any time during the continuance of this copartnership depart this life, and his executors or administrators shall take on themselves the whole of the said joint trade, and purchase the share of the said [B. B.] by virtue of the agreement hereinbefore contained, then the said [A. A.], his heirs, executors, or administrators, shall and will at all times thereafter effectually indemnify and keep indemnified the said [B. B.], his executors and administrators, of, from, and against all costs,
[*159] charges, damages, and expenses *which may arise, happen, or be occasioned to him or them, by reason of any action or suit which shall or may be brought by the executors or administrators of the said [A. A.] in the name of the said [B. B.], in pursuance of any power or authority to them given in that behalf, or by means of any cause, matter, or thing relating to or in anywise concerning the said joint trade and copartnership (*n*).

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dissoluble by either partner, yet the right of purchasing his partner's share is given to A. alone, and not, as it commonly is, to the party to whom the notice is given; so that A. may exercise his right of dissolving the partnership for the purpose of possessing himself of the share of the other, *i. e.* he has an absolute power of expelling his partner from the concern. Such a power (and the observation applies to many clauses of the precedent in the text) could scarcely have been submitted to, unless where there was much disparity in the situation of the parties at the formation of the partnership.

(*n*) It is generally provided, that, upon the execution of the deed which is to contain the authority to use the name of the assignor, the assignee shall enter into a bond or covenant of indemnity; and this seems to be rather the more advisable course, because the terms of the instrument can then be adapted to the circumstances of the case; whereas, if the covenant of indemnity is contained in the articles themselves, and the circumstances under which the assignment is executed are not strictly in accordance with those expressed in the articles, a question might arise whether the covenant is applicable. The reason, however, of introduciug the covenant in the articles in the present case is, that as the parties to give the indemnity are trustees, being interested in the character of executors or administrators only, and not beneficially, they might object to enter into such a covenant. It seems, indeed, fair that the covenant should be so framed as not to affect them beyond the extent of the assets which have come to their hands.

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Lastly. THAT (*o*) in case any dispute, controversy, or difference (*p*) shall arise between them the said [A. A.] and [B. B.], at any time during the continuance of this copartnership, or at the expiration thereof, or between the executors, administrators, or assigns of the said [A. A.], and the executors or administrators of the said [B. B.] (in case they the said [A. A.] and [B. B.], or either of them, shall at any time during the continuance of this copartnership depart this life), for or in respect of any matter, cause, or thing whatsoever relating to or in anywise concerning the said joint trade and copartnership, the same shall, within twenty-one days after such dispute, controversy, or difference shall so arise, be referred and submitted to the decision and determination of three persons, to be indifferently chosen as arbitrators; one of whom shall be chosen by the said [A. A.], his executors, administrators, or assigns, one other of them by the said [B. B.], his executors and administrators, and the third by those two persons so chosen: And in case either of them the said [A. A.] and [B. B.], or their re-

If any dispute arise, the same to be submitted to arbitration.

One arbitrator to be chosen by each party, and the third by those two.
If either omit or refuse, the other to appoint two

(*o*) In addition to the general arbitration clause, it is frequently advisable, in regard to disputes of a technical nature, which may arise, to insert a provision to this effect:—

"THAT if any question or dispute shall arise between the said parties respectively, or their respective executors or administrators, in regard to the sufficiency or propriety of any provision or clause to be inserted in any bond, assurance, or instrument to be executed by them, or either of them, in pursuance of any agreement herein contained, or in regard to the validity or the true construction of any stipulation, article, or thing contained in these presents, then and so often as the same shall happen, such question or dispute shall be referred to the opinion of his Majesty's Attorney-General (or, *as the case may be*, to his Majesty's Solicitor-General) for the time being, (or, *as the case may be*, to the senior King's counsel practising in the Court of Chancery), whose opinion therein shall be final and conclusive."

Certain disputes to be referred to Attorney-General, &c.

(*p*) If the clause suggested in the last note be added, the following words should be inserted here:—

"other than such as are hereinbefore specially provided for."

BETWEEN THREE TRADERS.

and [C] of the third part: WHEREAS the said [A.] and [B.] have for several years past carried on the trade or business

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in contemplation, lent 2000*l.* to A., for which he was to receive not only 5*l. per cent.* interest, but also such surplus profits as should arise from these two shares in the business, he himself not being bound, on the other hand, to make good to the partners any part of the losses which the trade might sustain. The simple question is, whether this is not an agreement to receive more than the 5*l. per cent.* allowed by law for the forbearance of a loan; most unquestionably it is: and it is therefore void. It has been argued, however, that this was not an usurious contract, because the principal was put in hazard, *as it was liable to the partnership creditors;* but it was no farther hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency, for, as between the plaintiff and the partners in the business, he was not not liable to contribute to the losses in the trade."

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Remarks upon the case of *Morse* v. *Wilson.*

It is evident, therefore, that the Court considered the lending party to have rendered himself liable as partner to third persons, and that this did not exempt the transaction from being usurious as between the parties. The argument however, that the principal was no more hazarded than in the case of any other loan, loses sight of the great distinction between the risk of a partner and that of a lender of money merely. A partner hazards his whole property by his liability to the partnership engagements, but the risk of a lender is confined to the sum advanced. The cases, it is obvious, are not analogous.

But the principle of the case of *Morse* v. *Wilson,* if tenable to *any* extent, can only be applied to a case in which loan and not partnership is the real object of the parties, and is not to be considered as precluding an arrangement between the members of a firm, that the capital of one partner shall be repaid to him at a given period or event, without any deduction for losses, with an interim allowance of more than 5*l. per cent.* during the period of its being employed in the concern. In the case of *Anderson* v. *Maltby* 2 Ves. jun. 248, it was contended, that an allowance to a partner of 7½ *per cent. per annum* on the amount of his capital was usurious; but Lord *Loughborough* considered it to be a sufficient answer to the objection, that the parties were partners; observing, that *an advantage to be taken out of the trade might be measured in any way agreed on;* for the money was not lying at interest, but employed in making profits subject to losses. The point, however, came more deliberately under consideration in the much discussed case of *Enderby* v. *Gilpin,* 5 J. B. Moore, 571, where A. and B. covenanted by deed to become partners in the business of an army clothier for ten years; and it was agreed that A. should advance 20,000*l.* as part of the capital for carrying on the business; and

of ——, in —— street, in the city of ——, as partners: And whereas the said [A.] and [B.], being desirous of aug-

BETWEEN THREE TRADERS.

Recital of agreement.

that B. that should provide the residue, which should be, at least, an equal sum; that, during the continuance of the partnership, A. should receive out of the profits, and in case of their being deficient, out of the capital, 2,000*l. per annum* for his share of the profits†, and that the residue of the profits should belong to B.; that the business should be carried on by and in the name of B. alone, who should deliver to A. annually a balance sheet; and that B. should pay out of the stock all losses, and guarantee the payment of all debts that should be due from the partnership. There was also a covenant by B. that, on the determination of the partnership by effluxion of time, the sum of 20,000*l.* should be repaid to A. by six instalments, at three months' date, with interest, to be computed at the termination of the partnership: and if default was made in the annual payment of 2,000*l.*, or the value of the partnership effects was at any time reduced to 20,000*l.*, it should be lawful for A. to determine the partnership by notice. And in case B. should refuse to render an account, or should deny the perusal of the books to A., that A. might, upon one month's notice, dissolve the partnership; and the 20,000*l.* should be payable on the expiration of the notice. In an action of covenant brought by A. to recover the 20,000*l.* at the expiration of the partnership term of ten years, the defendant pleaded that the deed was executed by way of shift, in pursuance of an usurious contract. This being denied by the replication, issue was joined. The action was directed by the Vice-Chancellor, to try whether the deed constituted a *bonâ fide* partnership, or was a mere loan under the cover of a fictitious partnership. The Jury negatived the usury, by finding for the plaintiff A. A rule *nisi*, for a new trial, had been obtained, on the ground that the verdict was contrary to the evidence; and also to arrest the judgment, on the ground, that the deed was usurious, upon the face of it; and the case of *Morse* v. *Wilson*, was strongly urged as an authority for the usurious nature of the transaction. The Court, however, was of opinion that the verdict was consistent with the evidence, *and that there was nothing upon the face of the deed to impeach its validity*. Mr. Justice *Park*, who was the only Judge that distinctly adverted to the case of *Morse* v. *Wilson*, seems not to have quite acquiesced in the doctrine there maintained, that a person might be a *partner* to the world, and a *lender* to the other party. "If it were a loan," said the learned Judge, "I cannot conceive, where one man lends money to another in trade, and receives more than legal interest for it,

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† Though this was denominated a "share of *profits*," yet it will be observed that it was to come out of the capital if there were no profits.

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menting the capital of their said joint business for the purpose of conducting the same with greater vigour and ef-

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that he thereby becomes liable for all the debts of the firm; that, however, must have been assumed by the Court in that case." The case of *Enderby* v. *Gilpin* was afterwards brought before the Court of King's Bench on a writ of error, when that Court affirmed the judgment of the Court of Common Pleas, on the ground, that the jury having negatived the allegation, that the deed was executed by way of contrivance to cover a loan, it must be taken to speak the language of truth; *and that, upon the construction of the deed itself, the parties had a partnership, and not a loan, in contemplation.* *Gilpin* v. *Enderby*, 5 Barn. & Ald. 954.

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So, in the case of *Fereday* v. *Hordern*, Jac. Rep. 144, where A., B., and C., who were partners as ironmasters, by indenture, in consideration of 4000*l.* paid to them by D. in augmentation of their capital, agreed to admit him into partnership with them for twenty-five years, if A. and any one of the others should so long live; but D.'s name was not to appear in the firm. It was agreed that D. should receive, in lieu of profits, a clear sum of 550*l. per annum;* and all the property of the concern was charged with the payment of this sum quarterly, and of the 4000*l.* at the determination of the partnership. A., B., and C. were to pay rent, taxes, wages, and the other outgoings of the trade, and have the sole management, D. not being required to bestow any attention; but the books were to be open to his inspection, and an annual account was to be rendered him. D. was at liberty to retire on giving twelve months' notice; and on his retirement, or at the end of the term, the 4000*l.*, and the arrears (if any) of the 550*l. per annum*, were to be paid to him by A., B., and C. by instalments, to be secured by their bonds; and they were to indemnify him from the debts of the partnership. It was contended that this was usury under the device of a partnership agreement; but Lord *Eldon* held, that it was not usury, D. being a partner; and though he was not under any liability as between himself and the plaintiffs, (his partners), yet he was liable to all the debts of the concern as to all the rest of the world.

The two preceding cases clearly warrant the position, that no pecuniary allowance to an actual partner, by way of compensation for the use of capital, though exceeding the legal rate of interest, and exempted by express stipulation from being affected by the losses of the concern, is impeachable for usury.

Whether an annuity to a retiring partner, &c. leaving his capital, exceeding legal interest, constitutes usury.

The agreement that a retiring partner, or the widow, children, or representatives of a deceased partner, shall receive an annuity from the continuing or surviving partner or partners, in whose hands it is also stipulated that the capital of such retiring or deceased partner shall be left for a definite period, at legal interest, suggests another case in which the objec-

fect, have proposed and agreed to admit the said [C.] into partnership with them in the said business, upon the terms, and subject to the covenants hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the mutual confidence which the said parties respectively repose in each other, and of the covenants hereinafter entered into by

BETWEEN THREE TRADERS.

Testatum.

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tion of usury occurs; and this objection is the more important, since it has been decided that such an annuity, if absolute, and not payable out of, or dependent upon the profits, does not involve the person receiving it in partnership responsibility, even to third persons. *Grace* v. *Smith*, 2 Blacks. 998. It follows, therefore, from this doctrine, that, in order to sustain the legality of the transaction as non-usurious, it must be shewn that the annuity was stipulated to be paid, not in consideration of the forbearance of the money, but on some other account. In a case which [166] lately came under the editor's consideration, it was the intention of the persons about to form a partnership, that the capital of a deceased partner should remain for a certain period in the concern, at interest, and also that the widow should receive an annuity, which was to cease when the capital was withdrawn. The editor thought the provision was objectionable, on the ground just adverted to. To this objection, however, it was urged, that partners might clearly stipulate for the absolute payment to a third person of an annual sum on the decease of such partner; and if this could be done absolutely, why not upon the condition in question as well as any other event, and that the annuity might be considered and expressed to be as a compensation for the services of the deceased partner to the partnership, and not for the use of the capital. This reasoning, however, seemed not to be satisfactory, since the making the annuity coexistent with the loan, precluded, it is conceived, the possibility of disconnecting them, and the experiment was deemed too perilous to be adopted. In *Grace* v. *Smith*, the stipulation was between partners themselves on the retirement of one of them from the concern, and not between a surviving partner and the representatives of deceased partners. The retiring partner was to leave 4000*l.* in the business for seven years, at 5*l. per cent.* interest, and was also to receive an annuity for seven years. The Court was not called upon to say whether the agreement was usurious; but it is evident, from the observations of Mr. Justice *Blackstone*, that he considered this conclusion to be consequential on the Court's determination that it was a loan and not a partnership; from which conclusion, indeed, it seems to be very difficult to escape, the annuity and loan being contemporaneous, though not expressly dependent on each other.

BETWEEN THREE TRADERS.

the other and others of them, each of them the said [A.], [B.], and [C.] hereby covenants with the other and others of them, and the executors or administrators of the other and others of them, in manner following, (that is to say):—

Term of partnership.

I. THAT they the said parties respectively will become and continue partners in the said business of ——, from the —— day of ——, for the term of seven years thence next ensuing.

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Capital, how to be advanced.

*II. THAT the capital requisite for carrying on the said business shall be advanced by the said partners respectively in the proportions following: The said [C.] shall advance and bring in the sum of 5,000*l.*, and the said [A.] and [B.] shall advance and bring such further sum and sums of money as shall be requisite for carrying on the said business in equal proportions.

Incoming partner, [C.], to pay his proportion of capital by a certain day.

III. THAT the said [C.] shall, on or before the said — day of —— next, pay into the banking-house of Messrs. —— and Co. the said sum of 5,000*l.*, so to be advanced by him as aforesaid, to the credit of the said partnership.

Business to be carried on as heretofore.

IV. THAT the partnership business shall be carried on in the same warehouse and premises, and under the same style or firm, and in the same manner in all respects (except so far as the same is hereby altered) as the said business has been heretofore carried on by the said [A.] and [B.]

[C.] not to be required to attend.

V. THAT the said [C.] shall not be required to give his attention to the said business, nor shall interfere in the concerns thereof, except as hereinafter mentioned; but the same shall be under the exclusive direction and control of the said [A.] and [B.], who shall devote their whole time and attention to the management thereof.

[C.] to receive a certain sum in lieu of profits.

VI. THAT the said [C.] shall, in every year during the continuance of the said partnership, receive, out of the profits of the said business, and if such profits shall be insufficient for the purpose, then out of the capital of the said partnership, the sum of 500*l.*, in full satisfaction of his share of the profits thereof, to be paid in equal half yearly portions on the — day of —— and the — day of ——, and that the residue of such profits (if any) shall belong to the said [A.] and [B.] in equal proportions.

Expenses and losses to be paid

VII. THAT the rents, taxes, rates, and other expenses which shall become payable in respect of the warehouse or

BETWEEN THREE TRADERS.

counting-house and premises where the said business shall be carried on, the expense of providing coals and candles, and of paying and maintaining clerks, agents, and servants to be employed in the said partnership business, the expenses of travelling, and all other charges which may be incurred by the said partners respectively in the conduct of the said business, and all losses, costs, and damages which may be sustained by them on account of *the said partnership business, shall be paid and borne exclusively out of the respective shares of the said [A.] and [B.] in the profits of the said business, or in the capital, stock, estate, and effects of the said business.

and borne by [A.] and [B.]

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VIII. That during the continuance of this partnership, within one calendar month after the —— day of —— in every year, unless the said partners, or any of them, shall be prevented by illness, and then as soon after the said period as circumstances will permit, the said [A.] and [B.] (with the assistance of the said [C.], if he shall think proper to render such assistance), shall make a full, particular, and perfect account in writing of all the stock, credits, and other things belonging, due, and owing to the said partnership, and of all debts due or owing by or from the said partnership to any person or persons by reason thereof; And that, upon every such account, to be taken as aforesaid, a true and just valuation shall be made of all the particulars which shall be included therein, according to the custom of the said trade; which said respective accounts and valuations shall, within the time aforesaid, be written in three books, to be respectively subscribed by the said partners; and after such subscription, each of the said partners shall take one of the said books into his custody, and shall be concluded by the said accounts, unless some manifest error shall appear therein within the space of —— calendar months next after the taking of such accounts, and shall be notified by any one of the said partners unto the others of them within that time, and in such case only such error shall be rectified.

Annual account to be taken.

IX. That the said [A.] and [B.] shall and will not only furnish to the said [C.] a copy or transcript of such annual account as aforesaid, but will, at all times during the continuance of this partnership, freely and unreservedly com-

[A.] and [B.] to communicate to [C.] information respecting the partnership business.

BETWEEN THREE TRADERS.

municate and disclose to the said [C.] such information respecting the said partnership as shall enable him to form a correct opinion of the actual condition thereof.

Division of profits.

X. That, upon the making up of every such yearly account, the said [A.] and [B.] shall respectively divide amongst themselves, in equal proportions, the clear profits of the said partnership business which shall have accrued or been gained in the preceding year, after making thereout such payments as aforesaid; And the share of each *partner in such profits shall thereupon be placed to his separate account.

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No clerk to be engaged, &c.

XI. That no clerk, servant, or other person shall be engaged by either of them the said [A.] and [B.] in or about the said partnership business, or dismissed therefrom, without the consent of the other of them.

Proper accounts to be kept.

XII. That the said partners respectively shall, from time to time during the continuance of the said partnership, write or cause to be written in proper books of account to be kept for that purpose, true, plain, and perfect entries of all monies which shall be received and paid, and all goods which shall be bought and sold, and all contracts which shall be entered into by the said partners respectively, or their clerks or servants, and of all such other matters or things as shall be, or ought to be, entered in the said books, in the usual and regular course of the said business, with all such circumstances of names, dates, times, and places, as may be necessary or convenient for better understanding the same: And the said books of account, together with all bills, notes, drafts, securities for money, letters, and other papers and writings relating to the said business, shall be kept at the counting-house or other place where the said partnership business shall be carried on, and not elsewhere, and shall at all reasonable times be open to the inspection of all the said partners respectively.

Partners to be faithful to each other.

XIII. That the said partners shall be true and just to each other in all their contracts, reckonings, receipts, payments, and dealings.

[A.] or [B.] not to enter into contract, &c. after request

XIV. That neither of them the said [A.] and [B.] shall transact any business or enter into any contract or agreement with any person or persons, or lend, give credit, or advance

BETWEEN THREE TRADERS.

any sum or sums of money out of the partnership funds to any person or persons after he shall be requested by the other of them not to do the same; And that neither of them the said [A.] and [B.], without the consent of the other of them, shall release or discharge any debt or duty which shall be due or owing to the said partnership without receiving the full amount thereof, or sign any bankrupt's certificate, letter of licence, or other instrument, whereby any debt or security shall be in anywise discharged, vacated, or diminished, until the same shall have been paid and satisfied; And that neither *of them the said [A.] and [B.], without the consent of the other of them, shall draw or accept any bill of exchange or promissory note, or contract any debt on account of the said partnership, except in the usual and regular course of the business of the said partnership, and for the benefit thereof: And that none of the said partners shall assign over his share or interest in the said partnership stock and effects, or withdraw for his private use the whole or any part of his share of the capital stock of the said partnership, or become bail or surety with or for any person or persons whomsoever, or shall carry on, either separately or in partnership with any other person or persons, the trade or business of a —— at —— aforesaid; And that the said [A.] and [B.] shall not, either separately or in partnership with any other person or persons, carry on any other trade or business whatsoever at —— or elsewhere; And that none of the said partners shall do or commit, or permit to be done or committed, any act, matter, or thing whatsoever, by which, or by means of which, the said partnership monies or effects shall be seized, attached, extended, or taken in execution.

from the other not to do so.

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[C.] may retire upon notice.

XV. That in case at any time during the continuance of the said partnership the said [C.] shall be desirous of retiring from the said business at any time before the expiration or other sooner determination of the term of the said partnership, and shall give to the said [A.] and [B.], or leave for them at the counting-house of the said partnership, —— calendar months' notice, in writing, of such his desire; Then, at the expiration of such notice, or at any subsequent or future time or period to be mentioned therein, the said

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partnership shall, so far as respects the said [C.], absolutely cease and determine.

Upon the dissolution, [C.] to be paid his full share of capital.

XVI. That, upon the determination of the said partnership by effluxion of time, or by the death of any or either of the said partners, or by any such notice to be given by the said [C.] as aforesaid, then, and in either of the said cases the said [C.], or his executors or administrators, as the case may be, shall, in the first instance, have and receive out of the profits of the said partnership business, and if they shall be insufficient, then out of the capital thereof, a proportional [*171] part of the said annual allowance *or sum of 500*l.* up to the period of the determination of the said partnership, and in satisfaction of his share of the profits thereof, to be paid immediately on such determination; and the said [C.], or his executors or administrators, shall also be entitled, out of the joint stock and property of the said partnership, to the full sum of 5000*l.*, in satisfaction of his share in the capital, property, and effects of the said partnership, and without any deduction on account of the expenses or losses which may have been incurred or shall have accrued therein; which sum of 5000*l.* shall be secured to be paid to the said [C.], his executors or administrators, by the joint and several bond of the said [A.] and [B.], or the bond of such one of them as shall be then living, (as the case may be), by four equal instalments of three, six, nine, and twelve calendar months (*b*), to be computed from the time of the determination of the said partnership, with interest thereon at the rate of 5*l.*

Bond a preferable security to a covenant in a certain case.

(*b*) This case presents a solitary instance in which a bond for the payment of money affords a better security than a covenant in a certain possible event; for, as the rule seems to be, that an action of debt cannot be brought on a covenant to pay a sum of money by instalments until all the instalments are due, the contract being considered as entire, and not a distinct contract as to each instalment; *Rudder* v. *Price*, 1 Hen. Blackst. 547; *Coates* v. *Hewit*, 1 Wils. 80; it follows, that if the covenantor were to die pending the time of payment of the several instalments, no action could be maintained by the obligee against the devisee of the obligor until the time of payment of the last instalment had arrived. To this extent the observation made in the antecedent part of the present work, as to a covenant being equally efficient with a bond as a security (*ante*, Vol. 5, p. 235) must be qualified.

per cent. per annum from the time of such determination (*c*).

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XVII. That if the capital, stock, and effects of the said partnership, shall be insufficient to pay to the said [C.], his executors or administrators, the sum of 5,000*l.* as aforesaid, then the same shall be made good by the said [A.] and [B.] or their respective executors or administrators, in equal proportions out of their respective separate estates. IN WITNESS, &c.

If capital deficient, such deficiency to be made good.

(*c*) This clause only provides for the destination of C.'s share in the event of the dissolution. In regard to A. and B., the partnership is not distinguishable from those of former precedents.

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DEED *of* PARTNERSHIP *between two* MERCHANTS, *with ordinary Clauses: On the* DISSOLUTION *by* EFFLUXION *of Time or* NOTICE, EFFECTS *to be* DIVIDED; *the* CHOICE *of Shares to be* DETERMINED *by* CASTING LOTS: ARRANGEMENTS *as to* CONSIGNMENTS, *&c.: On the* DEATH *of either, the* SURVIVOR *to* TAKE *the* SHARE *of the* DECEASED, *according to the last* GENERAL ACCOUNT, *with a certain* ALLOWANCE *in* LIEU *of* PROFITS.

BETWEEN TWO MERCHANTS.

THIS INDENTURE, made &c., BETWEEN [A.], of &c., merchant, of the one part; and [B], of &c., merchant, of the other part: WITNESSETH, that, in consideration of the confidence which the said [A.] and [B.] mutually repose in each other, each of them the said [A.] and [B.], for himself, his heirs, executors, and administrators, doth covenant with the other of them, his executors and administrators, by these presents, in manner following, (that is to say):—

Parties.

Testatum.

Covenant by the respective parties—

I. THAT they the said [A.] and [B.] will become and remain copartners in the trade or business of a merchant, and in all things incident thereto, and in all other businesses

to be copartners

BETWEEN TWO MERCHANTS. for —— years. [*173]

which they shall mutually agree to trade and deal in (*a*), during the term of —— years from the —— day of —— *last, and fully to be complete and ended, if they the said [A.] and [B.] shall jointly so long live.

£—— to be the joint capital.

II. THAT the sum of £——, already advanced by the said parties in equal proportions, shall be the capital joint stock of the said copartnership.

Firm to be, &c.

III. THAT the firm or style of the said copartnership shall be [A.] and [B.]; and all cheques, bills, and other negotiable securities, letters, and other documents of business, shall be made and subscribed in the name of the said firm.

Profits to be employed in the business.

IV. THAT the said joint stock, and all the gains and profits that shall arise from the said business (subject as is hereinafter mentioned), shall, from time to time during the said copartnership, be employed therein to the greatest advantage of the said copartnership.

Neither of the parties to use the effects of the copartnership but for its benefit,

nor engage in any other trade without consent.

V. THAT neither of the said parties shall employ any of the monies, goods, or effects belonging to the said copartnership, or engage the credit thereof, except for the benefit of the said joint business; nor shall, during this copartnership, be engaged either solely or jointly for or with any other person or persons in any trade or business whatsoever, other than the business of the said copartnership, without the consent, in writing, of the other of them first obtained.

Place for carrying on the trade.

VI. THAT the said joint business shall be carried on by the said parties during the continuance of the said copart-

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Consent of all the partners requisite in order to warrant the extension of the partnership business to new branches of trade.

(*a*) In order to warrant the extension of a partnership to a business or branch of business not originally contemplated by the parties, the unanimous consent of all the partners is requisite; for it is competent to any individual member of a firm to insist, that the business of the partnership shall be confined to the objects for which it was constituted. And, therefore Lord *Eldon* lately decided, that a joint stock company formed for the purpose of effecting fire and life insurances could not, without the consent of all the shareholders, (of whom the plaintiff was one), be extended to marine insurances; his Lordship remarking, that "the Court would restrain particular members from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should restrain them. *Natusch* v. *Irving*, Gow, Part. Appen. 404.

nership within the warehouse now occupied by them, situate in ——, or within such other houses and warehouses as they the said [A.] and [B.] shall mutually agree upon.

Notes, bonds, &c. out of the ordinary course of business to be signed by both partners.

VII. That in all cases where there shall be occasion to give any note or other security for the payment of any sum or sums of money on account of the said copartnership (except where the same shall be necessary in the *common course of business), the same shall be respectively signed and executed by both the said parties.

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Otherwise the partner giving such notes, &c. answerable exclusively.

VIII. That if either of them shall give any such note or other security, (except in the case before mentioned) which shall not be signed or executed by the other of the said parties, then every such note, or other security, shall be deemed to be given on the separate account of the partner giving the same, who shall accordingly satisfy the same out of his separate estate, and shall indemnify the other of the said partners, and his estate, from the payment thereof.

Parties to employ themselves diligently.

IX. That the said parties respectively will diligently employ themselves in the business of the said copartnership, and conduct the same for the greatest benefit of the said copartnership.

To be faithful to each other.

X. That each of them the said parties will be just and faithful to the other in all his dealings and transactions, and will, from time to time, on request, render to the other a full and correct account of all matters and things relating thereto.

To be equally entitled to the partnership stock and profits.

XI. That each of them the said parties shall, during the continuance of this copartnership, be entitled to one moiety or equal half share of the said joint stock, and all apprentice fees, and other the profits that shall arise from the said joint trading, and of and in all the monies, goods, wares, merchandizes, and other things which from time to time shall belong to the said copartnership.

The expenses and losses of the business to be borne by the business; or, if deficient, by the parties in equal proportions.

XII. That the wages of the clerks and servants respectively, who shall be employed in the said copartnership business, and all expenses which shall be incurred therein, and all debts which shall be owing by reason of the said joint trade, and all losses which shall happen thereto (excepting only such losses as shall arise from lending or delivering upon credit of any goods or monies by either of the said parties, contrary to the notice or warning of the other of them (as hereinafter is mentioned), shall be paid and borne

BETWEEN TWO MERCHANTS.

by and out of the joint stock of the said copartnership and the profits arising from the said business, or, in case the same shall become deficient, by the said parties, out of their respective separate estates, in equal proportions.

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Allowance for boarding apprentices, clerks, or servants.

*XIII. THAT the sum of £—— yearly shall be allowed to each of the said parties who shall diet and lodge any apprentice, clerk, or servant belonging to the said joint trade with the consent of the other of them, and that neither of the said parties shall take any apprentice, journeyman, or servant, for or in the business of the said joint trade, without the consent and agreement of the other of them.

Neither party to hire servants, &c. without consent of the other;

or lend money or give credit to any person whom the other has forbidden (in writing) to be trusted.

XIV. THAT neither of them the said parties shall, at any time during the continuance of this copartnership, lend any of the monies, or deliver upon credit any goods belonging to the said copartnership, to any person or persons whom the other of the said parties shall have forbidden him by notice in writing to trust; And if either of the said parties shall lend any money, or deliver upon credit any goods contrary to this present stipulation, then such party shall pay into the cash of the said copartnership, for the joint use of the said parties, so much ready money as the full amount or value of the money or goods which he shall so lend or deliver upon credit as aforesaid shall amount unto.

If either does, to pay the sum lent, or the value of the goods, to the copartnership.

Neither to purchase goods above the value of £—— without the other's consent.

XV. THAT neither of the said parties shall buy, order, or engage in any contract for any goods, wares, or merchandizes whatsoever exceeding the value of £——, without the consent in writing of the other of them first obtained; And if either of the said parties shall buy, order, or contract for any goods, wares, or merchandizes exceeding the value of £——, contrary to this present stipulation, then it shall be in the choice or option of the other of them, either to take such goods, wares, or merchandizes on account of the said joint trade, or to allow the same to remain for the separate use of the party who shall so buy or contract for the same.

If either does, the other party to have it in his choice to suffer them to be brought into the partnership account or not.

Neither to go journies or voyages without consent of the other.

XVI. THAT neither of the said parties shall take or go any journey or journies, voyage or voyages to Ireland or any other place, for or on account of the said joint trade, without the consent of the other of them, unless where, on account of the absence of such last-mentioned partner, or otherwise, it shall be inconvenient to obtain such consent.

Neither to give bond for or become bail with

XVII. THAT neither of the said parties shall, without the consent in writing of the other of them first obtained, enter

into any bond (*b*), or become bound as bail, surety, or security with or for any person or persons whomsoever (*c*), or subscribe any policy of insurance; And that neither of the said parties shall do, or wittingly or willingly suffer to be done, any act, matter, or thing whatsoever, by means whereof the joint stock of the said copartnership, or any other of the goods, wares, merchandizes, credits, monies, or effects belonging or to belong to the said copartnership or joint business, or his share or interest therein, may be seized, attached, extended, or taken in execution; And that each of the said parties shall and will from time to time duly and punctually pay and discharge his own proper debts: [And that each of the said parties, his heirs, executors, or administrators, will from time to time, and at all times hereafter, keep harmless and indemnified the other of them, his heirs, executors, and administrators, and the capital joint stock of the said copartnership, and all other the said premises, from his separate debts and engagements already contracted or entered into, or hereafter to be contracted or entered into, and from all damages and expenses on account thereof (*d*)].

any person without consent, or do any other act whereby the partnership may be prejudiced.

Each party to pay his own proper debts, and indemnify partnership stock therefrom.

XVIII. That it shall be lawful for each of the said parties, yearly, during the said copartnership, to take out of the clear profits of the said joint trade or business, the sum of £——, and no more, for his own separate use.

Each of the parties to take £—— *per annum* from the profits for his separate use.

(*b*) Add, if so intended—

"except such custom-house, excise, or other bonds as shall become necessary in the ordinary course of the said copartnership business or transactions."

(*c*) "except by joining as surety in custom-house or excise bonds for any person or persons."

(*d*) Though this stipulation has found its way into most of the common forms, it is not very accurate. It seems to proceed upon the supposition that the partnership property is liable to the separate engagements of the several partners, which is clearly not the case. It is true, that a partner's share in the joint property may be taken in execution for his separate debts, but this does not appear to be the event to which the clause is pointed; and the effect of a partner's share being disposed of by such means is to dissolve the partnership. (*Vide ante*, p. 25).

BETWEEN TWO MERCHANTS.

Books of account to be regularly kept.

XIX. That the said parties respectively shall make, or cause to be made, in proper books of account to be kept for that purpose, plain and correct entries of all the monies, goods, wares, merchandizes, credits, or other things, belonging or relating to the said joint trade, which shall be received, paid, sold, contracted for, bought, delivered out, bartered, and dealt in by them respectively, and the true rates and prices of such goods, wares, and merchandizes, and of all such other matters and transactions as are usually entered in books of account by merchants; which said books of account, together with all bonds, bills, specialties, and assurances, notes, letters, and other writings that shall from time to time concern the said copartnership or the business or joint stock thereof, shall remain with and be kept within the said houses or warehouses, or other the place wherein the said joint trade shall be carried on for the time being, and where each of the said parties, his executors or administrators, shall, from time to time during the continuance of the said copartnership, and after the expiration or other sooner determination thereof, have free access thereto to peruse, examine, and transcribe the same, without any hindrance or denial of or by the other of them; And in case either of the said partners shall happen to die during the continuance of the said copartnership, then the said books of account, together with all bonds, bills, specialties, and assurances, notes, letters, and other writings as aforesaid, shall be and remain in the possession of the survivor of them; and it shall be lawful for the executors or administrators of such deceased partner, from time to time, at their will and pleasure, to peruse, examine, and transcribe the same, without the hindrance or denial of him the said survivor; And further, that, on the —— day of —— now next ensuing, and on every succeeding —— day of —— during the continuance of this copartnership, a full and general account and rest in writing shall be made and taken by the said parties of all such goods, wares, and merchandizes as shall have been sold in the said joint trade or business, and of all the stock, monies, credits, and other things belonging, due, or owing to the said copartnership, and of all such debts as shall be due or owing from or by the said copartnership, and of all such other matters and things as are usu-

In case of the death of either, the executors of the other to be permitted to have access to them.

A general cast up to be made every year.

ally comprehended in annual accounts of the same nature taken by merchants; and a just valuation and appraisement shall be made by the said parties of all the particulars included in such account, which may be susceptible of valuation and appraisement; which said general account or rest, valuation, and appraisement, shall from time to time be written into two distinct books, and be signed and subscribed by each of them the said parties within three calendar months after the time appointed for the taking thereof respectively; And after such subscription, each of the said parties shall take one of the said books into his own custody, and shall be bound and concluded by every such account respectively, unless some manifest error shall be found therein, and shall be signified by one of the said parties to the other of them in the life-time of both the said parties, in which case, but not otherwise, such error shall be rectified.

Two copies of account to be made, one for each party.

Such accounts to be conclusive, unless some error is discovered during their joint lives.

XX. That if either of the said parties shall be desirous to determine and dissolve this copartnership at any time before the expiration of the said term of —— years, and of such his desire shall give or leave six calendar months' previous notice, in writing, to or for the other of the said parties at the counting-house belonging to the said joint trade, then and in such case the said copartnership and joint trade shall cease and determine upon the expiration of the said six calendar months, or at such future day or time as shall be named in the said notice.

Partnership may be dissolved by either on notice.

XXI. That within the space of six calendar months after the expiration of the said term of —— years, or next after the determination of the said copartnership by notice, pursuant to the power hereinbefore contained, a full and particular account, in writing, shall be stated and settled between the said parties of all the monies, credits, goods, wares, merchandizes, and effects then remaining and being in the said joint trade or business; and also of all debts and sums of money due or owing from or by the said copartnership; And upon the completion of such account, the said parties shall forthwith pay, or provide for the payment of, their respective shares of the debts owing by them in respect of the said copartnership, and shall also divide into two equal shares all the monies, credits, stock, goods, wares, merchandizes, and effects belonging, due, or owing to the said copartnership,

A general account to be taken at the dissolution of the copartnership.

The partners to pay their respective shares of the debts owing by the partnership;

and to divide the stock.

BETWEEN TWO MERCHANTS.

one of which several shares shall go and belong to each of the said parties; And for the prevention of disputes between the said parties on account of such partition, as to the choice or selection of such shares, such choice or selection shall be determined by lots to be cast for that purpose; And each of the said parties shall give unto the other of them a bond in a sufficient penalty for the payment of his proportion of the debts owing by the said copartnership; and effectually assign to and empower the other of them, his executors and administrators, to recover and receive such credits and sums of money as shall have been allotted to him as aforesaid, and all other things which it shall be necessary to assign in order to vest the sole right and property therein in the partner to whom the same shall be allotted as aforesaid; such bond and deed of assignment to be at the expense of the person requiring the same.

by lot;

and to give bonds to each other for the payment of their shares of the debts.

To assign to each other their respective shares of the stock, &c.

XXII. That, after such partition or division shall be made between the said parties, neither of the said parties, his executors or administrators, shall release any of the credits which shall have been allotted or assigned to the other of them.

After the partition, neither to discharge any of the credits assigned to the other.

XXIII. That in case either of the said parties shall die before the expiration or actual determination of the said copartnership, then and in such case the survivor of them shall have and take the stock, goods, wares, monies, credits, and things which shall then belong to the said copartnership, upon the terms following (that is to say):—In case no such account shall have been settled and subscribed by the said parties as aforesaid, and the day hereinbefore appointed for taking such account shall not then have elapsed, the executors or administrators of the party so dying as aforesaid shall be entitled to the full share and proportion of such party in the capital stock of £——, with interest for the same after the rate of five pounds for one hundred pounds by the year, from the commencement of this copartnership; and shall also be entitled to an allowance after the rate of one hundred pounds for every three calendar months, and so in proportion for any less time that shall have elapsed between the commencement of this copartnership and the day of the death of the deceased partner, in lieu of the balance of the account current of such partner with the said

On death of either, the survivor to take the deceased partner's share.

In case of such death happening before the day fixed on for settling the account, the survivor to pay one half of the capital with interest;

and also an allowance in lieu of profits.

BETWEEN TWO MERCHANTS.

joint stock and trade; the interest of such share to be computed as aforesaid to the time of such decease, with a deduction thereout, nevertheless, of any sum or sums of money which shall have been drawn out of the said copartnership funds by the said deceased partner, in pursuance of the thirteenth article hereinbefore contained; such allowance as aforesaid to be paid by the surviving partner, his heirs, executors, or administrators, on demand; and the share of the said deceased partner of and in the said capital stock of £——, with interest after the rate aforesaid from the time of such decease, to be secured as follows, (that is to say):—The surviving partner, his heirs, executors, or administrators, shall, within twenty days next after the decease of the said partner so dying as aforesaid, execute and deliver unto the executors or administrators of the said deceased partner his bond or obligation, in a penalty double the principal money for which the same shall be given, conditioned to pay the same sum, with interest after the rate aforesaid from the time of such decease, in manner following, (that is to say):—One third part thereof, with interest for the whole, at the expiration of six calendar months next after such death; one other third part thereof, with interest for two third parts thereof to be computed from the end of such six calendar months, at the expiration of nine calendar months next after such death; and the remaining third part thereof, with interest for the same, to be computed from the end of such nine months, at the expiration of twelve calendar months next after such death: But in case any such general yearly account shall have been then settled and subscribed as aforesaid, or any day hereinbefore appointed for taking such account shall have then elapsed, then the executors or administrators of the party so dying as aforesaid shall be entitled to such sum of money as the part and share of the deceased party of and in all and singular the monies, goods, wares, and commodities, credits, effects, and things belonging to the said partnership, shall, upon the balance of the then last general yearly account, made up, and settled, and subscribed, amount unto, or as such share would have amounted *unto in case such yearly account had been taken on the —— day of —— immediately preceding such death, together with interest for the same after the rate aforesaid

Such allowance to be paid on demand.

Share in capital to be secured as follows:

The survivor to give a bond for payment by instalments.

With interest.

In case such death happens after any yearly account, the representatives to be entitled to the share of the deceased at the time of taking such account, with interest, and an allowance in lieu of profits.

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BETWEEN TWO MERCHANTS.

to be computed from the —— day of —— immediately preceding such death; And shall also have and be entitled to an allowance after the rate of one hundred pounds for every three calendar months, and so in proportion for any less time that shall have elapsed between the —— day of —— immediately preceding the day of the death of the party first dying, in lieu of the balance of the account current of the party so first dying with the said joint stock in trade, with interest to the time of such death, deducting therefrom, nevertheless, any sum or sums of money which shall have been previously drawn by the deceased partner out of the funds of the said copartnership, in pursuance of the thirteenth article hereinbefore contained, such allowance as aforesaid to be paid by the surviving partner, his heirs, executors, or administrators, on demand (*e*); and such principal sum of money, with interest for the same, after the rate aforesaid, from the time of such decease, to be secured by the bond of the surviving partner, and to be payable by instalments in such manner in every respect as is hereinbefore declared concerning the share of the deceased partner, in the event of his dying before the day fixed for settling and subscribing the general account as aforesaid; And in either of the cases or events hereinbefore mentioned, such surviving partner, his heirs, executors, or administrators, shall also, on request, give and execute one other bond in a sufficient penalty unto the executors or administrators of the deceased partner, to be conditioned for the saving harmless the heirs, executors, and administrators *of such deceased partner from the debts which shall be owing by the said copartnership at the time of such his decease, and all actions, damages, and expenses in respect thereof (*f*);

And also to give a bond of indemnity to the representatives of the deceased.

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(*e*) An agreement of this nature, entitling the representatives of a deceased partner to the amount of his share in the capital and property of the partnership, according to the last annual estimate, with a certain sum in lieu of his share of profits, is well calculated to prevent disputes; but the benefit of such an arrangement is frequently lost by the neglect of the parties to make the annual estimate; in which case, the representatives of the deceased partner are entitled to a share of the profits up to the period of his death.

Representatives

(*f*) At law, the representatives of a deceased partner are not liable to

BETWEEN TWO MERCHANTS.

The representatives of deceased partner to release to survivor all their interest.

And the executors or administrators of the said deceased partner shall, at the request, costs, and charges of such surviving partner, his executors or administrators, release and for ever quit claim unto the said surviving partner, his executors and administrators, all their right and interest in and to the joint estate and effects, and do all requisite acts for

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of deceased partner not liable to joint engagements at law.

the joint engagements of the firm, whether contracted by bond, bill, note, or otherwise; but all actions thereon must be brought against the surviving partner or partners alone. In equity, however, a partnership debt constitutes the several contract of each partner: consequently, the joint creditors have a claim upon the assets of every deceased partner for their respective demands. *Lane* v. *Williams*, 2 Vern. 277, 292; *Bishop* v. *Church*, 3 Atk. 961; *S. C.* 2 Ves. sen. 371; *Devaynes* v. *Noble*, *Sleech's* case, 1 Mer. 563. This equity arises incidentally from the right among the partners themselves to have the assets of the deceased partner applied in discharge of the joint obligations. But the principle extends only to debts contracted by the partners in the course of their joint trade, and not to engagements entered into by them *aliunde*. Thus, in a late case, where A. and B., partners, entered into a joint covenant with the representatives of a deceased partner, to indemnify them against the engagements of the firm, and, on the death of A., it was attempted to fix his representatives with a proportion of the loss, on the ground that the obligation, though joint at law, yet, being by partners in trade, was several in equity. Sir *W. Grant*, M. R., held, that the surviving partner alone was liable in equity as well as at law, stating the grounds of the distinction with his usual force and clearness. *Sumner* v. *Powell*, 2 Mer. 30, *ante*, Vol. 3, p. 186. This case shews the importance of making bonds or covenants by partners to third persons several as well as joint.

Contra in Equity.

And it may be observed, that the circumstance, that, in a joint bond or note, one of the obligors or makers is described *as surety*, is not a sufficient ground for construing it as a several bond or note as to such party. Thus, in a late case, where the facts were as follow: Messrs. Oldham & Co. claimed before the Master to prove a debt due to them from James Parr, deceased. The Master reported that Messrs. John & James Ewing being indebted to Messrs. Oldham & Co. in the sum of 487*l.* 14*s.* for goods sold to them, the latter had demanded payment, when the Ewings, being unable to pay, requested Messrs. Oldham & Co. to give them time; and, to induce them so to do, offered to secure the payment of the said sum of 487*l.* 14*s.* by the promissory note of themselves and James Parr. Messrs. Oldham & Co. acceded to their proposal; whereupon John & James Ewing, and James Parr, as their surety, made, signed, and de-

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empowering the said surviving partner, his executors or administrators, to recover and receive the same.

As to consignments at the dissolution of the partnership.

XXIV. THAT at the end or other sooner determination of the said copartnership, all the goods, merchandizes, and effects which shall have been consigned by any person or persons to the said partners respectively on account of the said joint trade, and which shall then remain in their hands undisposed of, shall be delivered to such of the parties willing to receive the same as the respective proprietors thereof shall order and direct; such party to whom the same shall be ordered to be delivered, and who shall receive the same, first reimbursing the other party the expenses then incurred by him on account thereof, and also paying into the cash belonging to the said joint trade all such debts or balances of accounts as shall be owing to the said joint trade from the proprietor or proprietors of such goods, merchandizes, or effects, to be delivered as aforesaid.

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Remittances of bills, though not then paid, to be placed to the joint account.

*XXV. THAT all remittances or drafts of or for money by or from any of the correspondents or customers of the said copartnership, which shall be entered in any of the books before the determination of the said copartnership, shall be paid and received upon the joint account of the said parties, notwithstanding such remittances or drafts shall not be

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livered to Messrs. Oldham & Co. a promissory note of the following tenor:—

"*Liverpool, June* 1, 1820.

"Eighteen months after date we promise to pay to Messrs. Oldham & Co. 487*l.* 14*s.*, with lawful interest from the 14th of April last till paid, for value received.

"J. & J. Ewing,

"James Parr, (Surety)."

James Parr died, Ewing & Co. became bankrupts. The question then was, whether Parr's estate was liable. It was contended, that the nature of the transaction shewed that the security was intended to be several as well as joint, and, therefore, that this case fell within the principle of those in which the Court had relieved against a mistake, by which obligations, intended to be joint and several, had been made joint only. *Bishop* v. *Church*, 2 Ves. sen. 100, 371; *Thomas* v. *Frazer*, 3 Ves. 399; *Burn* v. *Burn*, Id. 573, *ante*, Vol. 3, p. 183. And of this opinion was the Master of the Rolls; but the judgment was reversed by the Lord Chancellor on appeal. *Rawstone* v. *Parr*, 3 Russ. 424.

actually paid and received until after the determination of the said copartnership.

If either party advances more money to the partnership than the other, to be allowed interest.

XXVI. That in case either of the said partners shall at any time or times, with the consent of the other of them, advance or lend any sum or sums of money to the said copartnership, exceeding the sum or sums of money which shall have been advanced or lent by the other of them, the joint stock of the said copartnership, and the gains, and profits, and effects thereof, shall be liable to refund and pay to the party lending the same, his executors, administrators, or assigns, all and every such sum and sums of money, with interest for the same after the rate of *5l. per cent. per annum* from the time of the lending or advancement thereof until the same shall be repaid, such interest to be paid by equal half yearly payments in every year, with a proportional sum for any less period than half a year; And if such joint stock, gains, profits, and effects shall be insufficient to pay the monies so lent, with interest as aforesaid, then the other party, his heirs, executors, or administrators, shall pay and make good out of his separate estate one moiety or half part of so much of such principal monies, and of the interest for the same as the said joint stock, gains, profits, and effects shall be insufficient to satisfy. In witness, &c.

In case of the deficiency of the joint stock, one moiety of the money so lent to be made good by the other partner.

BETWEEN MERCHANTS ABROAD.

ARTICLES *of* PARTNERSHIP *between* THREE MERCHANTS *trading between* LONDON *and* BUENOS AYRES: ONE *Partner to be resident in* ENGLAND, *and* TWO ABROAD: *An* ANNUAL ALLOWANCE *to be made to the respective Partners; the rest of the* PROFITS *to* ACCUMULATE: *Certain* COMMERCIAL SPECULATIONS *of* ONE *of the Partners to be* TAKEN *by the Concern:* ARRANGEMENTS *respecting an* ESTANCIA *and two* SALADEROS *(some of the Speculations in question) at the* DISSOLUTION: VARIOUS CLAUSES ADAPTED *to a* MERCANTILE FIRM ABROAD: *(Variation where the* BUSINESS *at* HOME *and* ABROAD *is carried on under* DIFFERENT FIRMS, *and the* SHARES *of the respective Partners in each are* DIFFERENT).

Parties.

ARTICLES of AGREEMENT, indented, made, and entered into this —— day of ——, 1830, BETWEEN [A.], merchant, now resident at Buenos Ayres, of the first part; [B.], merchant, now resident at ——, in the city of London, of the second part; and [C.], merchant, now resident at Buenos Ayres aforesaid, of the third part:

Recital.

WHEREAS the said parties hereto have for several months past carried on business at Buenos Ayres aforesaid as commission agents and general merchants, under the firm of [A. & Co.]; and they have agreed and determined to enter into and execute these presents for the purpose of declaring the period, and the terms and stipulations, for and upon which the said copartnership trade has been and is to be carried on:

Testatum.

NOW THESE PRESENTS WITNESS, That the said parties hereto do hereby mutually covenant and agree, each of them for himself, his heirs, executors, and administrators, with the others and each other of them, their and his executors and administrators, as follows:

I. That the said partnership commenced on the —— day of ——, 1830, and the term and duration thereof shall be five years, to be computed from that time; and further, that unless, six calendar months prior to the expiration of the said term, any one or more of the said copartners shall give notice, in writing, to the others or other of them of his or their desire to withdraw from the said copartnership, the same shall be continued for the further term of two years from the expiration of the before-mentioned term of five years.

Commencement and duration of partnership.

II. That the business of the said copartnership is and shall be that of commission merchants and general agents; but the said copartnership shall and will engage in any general speculations in trade which may be thought safe and desirable, subject to the restrictions and agreements contained in the following articles.

Nature of the business.

III. That the business of the said copartnership shall be carried on under the firm aforesaid for the mutual benefit of the said parties hereto, and at their mutual risk and expense, nevertheless, in the proportions following, that is to say: The said [A.] two fifths, the said [B.] two fifths, and the said [C.] one fifth (*a*); and that the sums which the re-

Respective shares of the partners.

(*a*) The following clauses are adapted to a case in which the firms in England and abroad are different, and the interests of the several partners different in each:—

"That the said trade and business in London shall, from time to time, be carried on and conducted under the style or firm of [A. & Co.], and the said trade or business in Buenos Ayres, or elsewhere abroad, shall, from time to time, be carried on and conducted under the style or firm of [C. & Co.], or such other style or firm, or styles or firms, as shall be agreed on, and for the benefit and advantage, and at the risque of all the said parties, in the proportions following, that is to say: In respect of the joint concerns of the said copartnership conducted at ——, in England, the said [A.] in two fourth parts, the said [B.] in one fourth part, and the said [C.] in the remaining one fourth part thereof; and in respect of the joint concerns of the said copartnership conducted at Buenos Ayres, or elsewhere abroad, as aforesaid, the said [A.] in three seventh parts, the said [B.] in two se-

Variation where firms in England and abroad are different and the shares of the partners are different in each firm.

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spective parties have advanced as the capital of the said copartnership are as follows: The said [A.], (in money or money's worth, as appears by article * thirteen), 4000*l.* British sterling; the said [B.], 4000*l.* British sterling; and the said [C.], (in money or money's worth, as appears by article thirteen), 2000*l.* British sterling.

Managing partners.

IV. That the resident partners at Buenos Ayres shall be

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venth parts, and the said [C.] in the remaining two seventh parts thereof.

That the said parties shall be interested in all the profits and increase which shall arise from, and in all monies, credits, stock in trade, goods, merchandizes, and commodities, which shall belong to the said respective concerns as aforesaid, in such shares and proportions as before mentioned; And that all debts which shall be owing by the said parties on account of the said respective concerns, and all losses and damages to the said joint stock or the gains thereof, by bad debts, suits in law or equity, or any other casualty whatsoever, and all rents, clerks' and servants' wages, travelling expenses, and other necessary expenditure, which shall be incurred in or about the trade or business of the said respective establishments, including the expenses of the resident partner in Buenos Ayres, and attending the conduct of the business there, and all travelling expenses of the respective parties incident to the respective concerns to be conducted in London and abroad as aforesaid, shall at all times during the said copartnership be allowed and paid by and out of the joint stock and the gains and profits of the respective branch or establishment of the said copartnership at Buenos Ayres or in England, in or relating to which such losses, charges, damages, or expenses shall have been so incurred; And in case the joint funds of such branch or establishment of the said copartnership shall become deficient, the same shall be paid by the said parties to these presents, their executors or administrators, out of their respective separate estates, in the shares and proportions in which they are or shall be so interested in the concern or the respective concerns in England or at Buenos Ayres as aforesaid, in which the same losses, charges, damages, and expenses shall have been incurred as aforesaid.

the said [B.] and [C.], and the resident partner in London shall be the said [A.]; That the said [B.] and [C.] shall have the general direction and superintendence of the partnership business and transactions at Buenos Ayres, and the said [B.] shall conduct and manage the department of sales and purchases; and the said [A.] shall conduct the business of the partnership in Europe: but whenever the said [B.] shall signify, in writing, to the said [C.] his desire to go to Europe, he shall be at liberty to do so; and in that case the said [A.] shall go forthwith to Buenos Ayres, there to conduct the same department of the business as was antecedently conducted by the said [B.], and to occupy his place; and the said [B.] shall occupy the place of the said [A.] in England.

Partners at the respective establishments.

V. That in all matters respecting the intended speculations and general transactions of the partnership, and the management of the business, the wish and opinion of any two of the partners shall govern and be binding on the third partner; That in case the said [C.] should differ in opinion from the senior resident partner at Buenos Ayres for the time being as to any proposed speculation, or any transaction or matter of business of the partnership, such question may be referred by the said [C.] to the resident partner in Europe for his decision, but in the mean time, until an intimation of such decision shall be received, the opinion of the senior resident partner at Buenos Ayres shall be acted upon.

Voice of the majority of the partners to bind the whole.

VI. That the resident partners at Buenos Ayres shall communicate to the resident partner in Europe, by the earliest opportunity, all particulars of and relating to all speculations and transactions which shall have been entered into, or have taken place, and shall also apprize him of every speculation and transaction about to be entered into or to take place as soon as determined upon or known.

Foreign partners to communicate transactions.

VII. That all the partners shall, jointly and severally, employ themselves diligently and with fidelity to each other in the affairs of the joint trade, and use their best *endeavours to promote its prosperity, and shall devote their whole time and attention thereto, and not engage in any speculation or business of any description on their respective separate accounts, (without prejudice, nevertheless, to the operations

Partners to employ themselves diligently, &c.

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of the said [A.], enumerated and recognised in clause thirteen), and shall not enter into any speculation on account of the said copartnership, which they respectively shall not in good faith consider to be likely to yield a profit, or which may, in reasonable expectation, involve danger or loss to the copartnership; And that none of the partners shall use the name of the partnership in any bill, note, or security, unless on the partnership account, nor lend any money or property of the partnership, nor separately and individually become bail or security for any person in any manner, except as surety in any custom-house or excise bonds.

Establishment to be maintained at Buenos Ayres.

VIII. THAT an establishment shall be maintained in Buenos Ayres at the expense of the partnership, for conducting the business thereof, and for the use and maintenance of the resident partners there; and such establishment shall be maintained on as small a scale of expense as reasonably can be. But in case the said [B.] or the said [A.] (whichever of them for the time being shall be the resident senior partner in Buenos Ayres) shall, during such residence, choose to live apart from the said establishment, he shall be allowed, out of the partnership funds, for his house expenses, a sum of —— dollars *per annum*.

Allowance to resident partner in Europe.

IX. That the said [A.] or the said [B.] (whichever of them shall for the time being be the resident partner in Europe) shall, during such residence, be allowed, out of the partnership funds, the sum of £—— British sterling *per annum*, for the expense of his establishment in Europe, and shall also be allowed all his expenses incurred in travelling about, while attending to and promoting the business of the partnership.

Interest to be allowed on capital.

X. That an allowance, at the rate of 6*l. per cent. per annum*, shall be made to each of the said copartners for the capital which he has already brought, or may hereafter bring, into the joint trade; But none of the said copartners shall make any such further advances in addition to his original capital so as to charge the copartnership with interest for *the same, without the previous consent, in writing, of the other partners.

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Profits and losses to be carried to the

XI. THAT the net profits of the copartnership trade, after the annual allowances to the respective partners as aforesaid,

and all charges or expenses, are defrayed or taken into account, shall not be drawn out by the respective partners, but shall be carried to the credit of them respectively in the proportions in which they are interested in the said joint trade, and to be left to accumulate in increase of the joint capital; And the losses, if any, in each year, shall in like manner be carried to the debit of the respective partners in the proportions aforesaid.

credit and debit of partners.

XII. That proper books of account, to be stated and kept by double entry, (including particular accounts of house expenses, salaries, and all other charges and expenses incurred by or about the joint trade), and also all letters, securities, evidences, and writings relating to the copartnership trade, shall be kept at the counting-house of the copartnership at Buenos Ayres, and be open to the inspection of each partner at all seasonable times, with liberty to each of them to take copies thereof; That, on every —— day of ——, and —— day of ——, or within four weeks thereafter, a balance sheet shall be made out, and one copy thereof sent to each partner; And that, on every —— day of ——, the books of the partnership shall be balanced, and the profit or loss arising on the transactions of the past year be carried to the respective accounts of the partners in their respective proper proportions; And upon the said accounts being approved and signed by all the partners, the same shall be conclusive on them respectively, and shall not be re-opened or disputed, save for the correction of some manifest error.

Accounts to be kept.

XIII. That all speculations and operations in business, whether in Buenos Ayres or Europe, which any of the said parties hereto may have already undertaken or been engaged in from and subsequent to the commencement of the said copartnership term, are to be considered as appertaining to the said copartnership, and to be taken to account thereof, together also with the four operations next hereinafter specifically mentioned, which had severally been entered into by the said [A.], in his own name *and on his sole account, prior to the commencement of the said partnership; which said speculations and operations are to be so taken to account as of the date of the —— day of ——, 1830; and in so taking them to account, the value in Bri-

Certain speculations entered into by one of the partners to belong to the firm.

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tish sterling of the current dollar of Buenos Ayres at the date aforesaid shall be estimated and taken as between the parties at — sterling *per* current dollar:

1*st.* An investment in hides and produce pending on the said —— day of ——, 1830, which is specified in a letter from Mr. —— to Mr. ——, of the —— day of ——, 1830, amounting, as of that period, to 251,749 dollars, more or less, of Buenos Ayres currency.

2*nd.* An investment in a Saladero managed by Mr. ——, entered into on joint account with him, amounting to 48,690 dollars, more or less.

3*rd.* An investment in an Estancia in the Banda Oriental, on joint account with [R. T.], of ——, and managed by [S. B.], amounting to 75,605 dollars, 4 rials, more or less.

4*th.* An investment in a Saladero, managed by [P. A.], of ——, entered into on joint account with the said [P. A.], amounting to 14,500 dollars, more or less.

And that the said Estancia and the said two Saladeros shall continue to be carried on upon the terms of the several contracts entered into between the said [A.] and the several other parties to the said respective undertakings.

As to concerns of Saladeros and Estancia.

XIV. That, at the close of this partnership, the said several concerns of Saladeros and Estancia shall be sold, and the accounts of the said undertakings finally closed; That such sale shall be made to the highest bidder, but with this proviso, that any of the said partners shall have a preference over any stranger bidding an equal price (*b*).

Effect of the death of *one* of three or more partners.

(*b*) The death of one of three or more partners, it has been shewn (*ante*, p. 25), operates a total dissolution of the firm, unless the contrary be stipulated by the articles. The effect of an agreement, such as that in the next clause, that the share of a deceased partner shall be purchased by the surviving partners, necessarily implies the continuance of the partnership by the survivors. To prevent all doubt upon this point, it may sometimes be advisable expressly to declare the intention of the parties thus:

Declaration, that, upon the decease of one, a partnership shall subsist between the survivors.

" That in case of the decease of any one of the said partners before the expiration of the said term of —— years, the said partnership shall cease and be dissolved as to such partner only, and the said joint trade or business shall or may be carried on and conducted by the surviving partners for all the residue of the said period of —— years, upon the same

BETWEEN MERCHANTS ABROAD.

Clause fixing and regulating the share of a deceased partner.

XV. That in case of the death of any one of the said copartners during the said copartnership, his interest therein shall continue until, and cease upon, the —— day of —— then next ensuing, and shall be considered as comprised in the balance sheet which shall be stated as of that date, save and except that, if his decease shall happen between any —— day of —— and any —— day of ——, his interest shall be considered as being comprised in the balance sheet dated up to the —— day of —— preceding, and shall terminate as of that date; That the interest of such deceased partner shall be stated and settled as soon as possible after his decease, and the amount which shall appear to be due to him shall be paid to his executors or administrators within twelve calendar months after his decease; That, inasmuch as the profit or loss in respect of the said Estancia * and Saladeros may not, owing to the nature of those establishments, be annually carried to the general profit and loss account, as provided in clause the eleventh, the interest of such deceased partner therein shall be ascertained by a fair and impartial valuation as of the date of his decease, and his share therein shall be purchased by and transferred to the account of the surviving partners (*c*). [*193]

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terms and conditions, and subject to the same stipulations (so far as circumstances will admit) as are herein contained; And the said surviving partners shall be respectively interested in the share of the partner so dying as aforesaid in the said joint trade or business, and the profits to arise therefrom, in the same relative proportions in which they are interested in the other or remaining shares of the said partnership; And that within —— days after the share of the said deceased partner in the capital of the said concern shall be withdrawn from or taken out of the said joint trade, pursuant to the stipulation in that behalf hereinafter contained, the same shall be replaced or made good by the surviving partners in the same proportions in which they respectively are to be interested in the profits arising from the said share as aforesaid."

(*c*) In the absence of express stipulation, it is clear that a partner would be entitled to the benefit, and would be subject to the risk, of all adven-

BETWEEN MERCHANTS ABROAD.

Arbitration clause.

XVI. That if, during the continuance of the said co-partnership, or after the termination thereof, and before the final settlement of the accounts, any dispute should arise between the parties hereto, or between the survivors or survivor, and the representatives of any deceased partner or partners, out of or relating to the partnership affairs, the same shall, within —— days after request in writing, by any of the parties in difference, be referred to three indifferent persons, one to be named by each of the partners, and by the respective representatives of any deceased partner or partners, such representatives respectively having, nevertheless, only a single voice in respect of the deceased partner whom they represent; And in default of any party naming an arbitrator within —— days, then the two arbitrators, or the one arbitrator named by the other two parties, or any one party, as the case may be, shall have power to appoint one or two arbitrators, as the
[*194] case *may be; and if, in the case of two arbitrators being appointed, they shall neglect to appoint a third for one month after their own appointment, such third shall be named by the British consul resident at Buenos Ayres, on the application of either party; And the award of any two of such arbitrators shall be conclusive, if given under their hands within three calendar months; And the disputing parties shall enter into such bonds or agreements of arbitration, and with such clauses therein, as are usual and proper in such instru-

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tures depending at the time of the dissolution. It may, however, be sometimes proper explicitly to declare such to be the intention of the parties, thus:—

Adventures depending at the dissolution to be for the benefit and at the risk of the partnership.

"That if, at the time of the dissolution of the said partnership by any of the means aforesaid, any vessel shall be then fitting out, or any adventure or transaction shall be then depending, such adventure or transaction shall be for the benefit and at the risk of the said respective partners until the completion or accomplishment thereof, and immediately after the result of such adventure or transaction shall have been ascertained, the profits arising therefrom, or the loss sustained therein, as the case may be, shall be divided between or contributed by the said partners respectively in the proportions aforesaid."

ments (*d*). WITNESS the hands and seals of the parties the day and year aforesaid.

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(*d*) In the case of a partnership consisting of two distinct branches, at home and abroad, one partner had a power of admitting a third person into the concern as a participant in the profits of his share, as follows:—

Power to one of the partners to admit a third person as partner in his share.

"That in case the said [A.] should think it prudent to admit into the said partnership concern generally, or into the Buenos Ayres branch of the said concern only, a partner to participate in his share of the profits of the said concern, or of the Buenos Ayres branch thereof, but not further or otherwise, he shall be at liberty to do so; but that such party so to be admitted as a partner shall be in every respect bound by all the stipulations, agreements, and provisions herein contained, as if he had been a party hereto, so far as the same are or may be applicable, and except as to the proportion of his share and interest in the gains and profits thereof; And the partner so admitted shall, when thereunto required by any or either of the said partners, at his own expense, enter into a covenant to perform and observe all and every the stipulations, agreements, and provisions herein contained.

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ARTICLES *of* PARTNERSHIP *between* MERCHANTS *carrying on* BUSINESS *in* DIFFERENT *Parts of the* WORLD (*a*). *(A short Form).*

THIS INDENTURE, made this —— day of ——, 18—, BETWEEN [A.], of ——, in the city of London, merchant, of the first part; [B.], of ——, in the city of London, aforesaid, merchant, of the second part; [C.], of Canada, North America, merchant, of the third part; and [D.], also of Canada,

(*a*) Though some of the clauses in this precedent are deserving of consideration, the preceding will be found to be more particularly adapted to the case of a mercantile partnership abroad.

BETWEEN MERCHANTS.
Testatum.

merchant, of the fourth part: WITNESSETH, that the said parties do hereby for themselves respectively, and their respective heirs, executors, and administrators, covenant and agree with each other, his executors and administrators respectively, that they the said parties shall and will become and continue copartners together as merchants and commission agents, and in such other trade and business as they shall from time to time mutually agree upon, for the period of —— years (determinable as after-mentioned) from the —— day of ——, at the several places, and upon and subject to the several terms, conditions, and stipulations hereinafter mentioned.

Term of partnership.

Stile of firm, and by whom the business to be conducted.

THAT the said copartnership concern shall be carried on in London under the firm of [A. & Co.], and shall be conducted by the said [A.] and [C.], and the same shall be carried on at Quebec, Halifax, and Three Rivers, in North America, under the firm of [B. & Co.], and be conducted by the said [B.] and [D.]; but the said [B.] shall be resident at Halifax, and the said [D.] at Quebec during the season, and each of them shall give every *assistance at Three Rivers that may be required or thought necessary.

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Capital how to be contributed.

THAT the capital or joint stock of the said concern shall be furnished and provided by the said parties in the following proportions, (that is to say): One third part thereof by the said [A.], one third thereof by the said [B.], one sixth thereof by the said [C.], and the remaining one sixth thereof by the said [D.].

Shares of the respective partners.

THAT the said parties shall be interested in the joint stock in trade of the said copartnership concern, and in all gains and profits arising therefrom, in the proportions aforesaid; And all losses, bad debts, wages, rents, and other charges and expenses incident to the said concern shall be borne and paid by them in the same respective proportions.

Interest to be allowed on further advances.

THAT if any of the said copartners shall bring any sum or sums of money into the said concern, or if he shall permit his gains to remain therein to a greater amount than his proper share thereof, he shall receive interest for such surplus after the usual customary rate of interest, at the place or places of the said copartnership business in which the same shall be so employed, before any division or distribution of gains shall take place, and the stock in trade shall be from

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time to time a security to such copartner or copartners for any such advance and interest; And if at any time during this copartnership, or at or after the end thereof, there shall not be sufficient stock in trade to answer the same, the other copartners shall, from their own respective proper estates, be liable to make good to the partner or partners so being in advance, a proportion of the same, according to their said respective interests in the said concern, to be recoverable in an action at law as for so much money lent and advanced by him or them to the other or others of the said copartners.

Such further advances to be made good in case of deficiency.

THAT each of them the said parties shall diligently apply himself in and about the business of the said concern and the management thereof, and pay such attention thereto as shall be thought necessary for the benefit and advantage of the said copartnership; And each of them the said [B.] and [D.] shall be allowed the sum of £—— *per annum* out of the said concern, before any division or *distribution of gains shall take place, for the entertainment of strangers at Halifax and Quebec.

Each partner to apply himself.

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Allowance to partners resident abroad for the entertainment of strangers.

THAT neither of them the said [B.], [C.], and [D.], shall, during this copartnership, either by himself or in copartnership with any other person or persons, enter into, engage in, or carry on any business or employment distinct from the present concern, without the consent in writing of the other copartners first obtained for that purpose; But the said [A.] shall be at liberty to engage in any other concern or commercial undertaking that he shall think proper, other than that of a merchant and commission agent, in any of the places in which the said partnership business shall be carried on.

Three of the partners not to engage in any other business.

THAT the said parties shall be true and just to each other in all their dealings, and shall give a true and just account to each other, upon request, of all their partnership concerns.

Each to be just to the other.

THAT none of the said copartners shall make or enter into any purchase, transaction, or engagement, or make any advance on consignments on account of this copartnership, or trust any person with goods or otherwise, to the amount of £—— or upwards, without the concurrence and approbation of the others of them; nor shall any of them enter into or make any purchase, transaction, or engagement, or make any advance whatsoever on consignments, or trust any per-

No purchase, &c. beyond a certain amount to be made without consent.

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son with goods or otherwise, to any amount whatever, after notice from the other copartners not to do so; nor shall any of them release or discharge any debt owing to the said concern above the sum of £——, without the consent of the other copartners.

No partner to draw bills, &c. for his own private use.

That none of the said copartners shall, for his own private use, or for any other purpose than the immediate use of this copartnership, draw, subscribe, or indorse any bill of exchange, promissory note, or other engagement, in the name of the said copartnership, or by means of which the said copartnership shall become bound, engaged, or liable, nor pay or apply any of the partnership monies or effects, except on account of the said concern, on pain of forfeiting treble the amount of such bill, note, or engagement, or of the money so mispaid or misapplied, to the others of the said copartners, to be paid by or deducted from the share of gains or capital of the concern of the *offending party, or to be recovered from him by an action at law at the suit of the other copartners, and to be divided between such partners in the same relative proportions as they are entitled to the profits arising from the said copartnership business; And that none of the said partners shall or will permit or suffer the said joint stock, or his share or interest therein, to be any way charged, incumbered, taken in execution, or otherwise attached, for his own private or particular debts.

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Books of account.

That, for the better carrying on such business, proper books of account shall be kept at the several counting-houses of the said parties in London, Quebec, and Halifax, or in some place which shall be from time to time appointed by them, in which shall be entered all the transactions and concerns of the said joint trade, according to the usual course and practice of merchants; and to which books any of the said copartners, their executors or administrators, or any other person or persons by him or them authorized, shall have free access for all matters respecting their trade and dealings, at all seasonable times, and may take copies thereof.

Yearly account.

That the said partners respectively resident in London, Quebec, Halifax, and Three Rivers, shall yearly, on the ——day of —— in each year, or as near thereto as circumstances will admit of, make up a particular statement, in

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writing, of all goods, credits, property, estate, and effects then being in or belonging to the said concern at such places respectively, and of all debts and duties then owing therefrom, and shall transmit the same or a copy thereof to each of the other partners by the first opportunity, and shall enter the said statement or account in a book to be kept for that purpose, and subscribe the same, which book shall be kept with the said other books, and which account shall not be opened or called in question, unless an error shall be found therein to the amount of £—— in any one year; And thereupon the said parties respectively shall be at liberty to take out of the said concern their respective shares of the profits of the preceding year, according to the proportions above mentioned; subject, nevertheless, to the said two several sums of £—— to be allowed the said [C.] and [D.] for the entertainment of strangers as aforesaid.

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Final account at the expiration of term.

*That within three calendar months after the expiration of the said term of —— years, or after the determination of the said copartnership in any of the events after-mentioned, or as soon afterwards as may be, the said parties, or their representatives, shall state and adjust a final account in writing of all the partnership estates and effects, and thereupon a division or partition thereof shall be made between the said copartners respectively, or their respective representatives, in such proportions as they shall be fairly and equitably entitled thereto, according to the terms of this copartnership, due care being first taken for payment of all the said copartnership debts, and for collecting and dividing all the said copartnership credits in the respective proportions hereinbefore agreed on, when this copartnership concern shall absolutely cease and determine; And each of the said parties, or his representatives, shall, on the request, and at the costs of the others of them respectively, or their respective representatives, make unto the said others of them respectively, or their respective representatives, an assignment of their respective shares of the said estate and effects as aforesaid, which shall be allotted to such others of them, or their respective representatives, and invest them with full power to collect in, recover, and receive the same; And none of the said partners, or their respective representatives, shall afterwards receive, release, discharge, or compound,

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any debts or demands which shall have been allotted to the others of them, or their representatives, without their respective consent in writing.

Partnership to cease partially on the death of one partner, and totally on the death of certain two.

That if any or either of the said copartners shall happen to die during this copartnership, then his personal representatives shall be and become interested in the said concern only until the —— day of —— next ensuing such decease, when this copartnership concern, as to the part, share, and interest of the said deceased copartner, but no further or otherwise, shall absolutely cease and determine; And if the said [B.] and [D.] shall both happen to die during the said term, this copartnership concern shall thereupon absolutely cease and determine as to all the said co-
[*200] partners, and the aforesaid account, division, and *partition shall in every such event be made in the same manner as is before directed at the end of the said term.

Lands to be purchased with partnership monies to be partnership property.

That if any lands, messuages, tenements, or hereditaments shall be purchased by and with the partnership monies or effects, the same shall be held and considered as the joint property of the said copartners in the proportions hereinbefore mentioned (*b*).

Partnership to be dissoluble by either partner upon notice after three years.

Provided always, that if any or either of the said parties shall be desirous of putting an end to this copartnership at the expiration of the third year thereof, they or he shall be at liberty to do so on giving full one year's notice, in writing, to the other copartners of his wish and intention so to do; for which purpose it is hereby declared, that two letters transmitted by the general post office at London, Quebec, or Halifax, at an interval of not less than fourteen days from each other, directed to the firm at the other of the said places respectively, shall be sufficient notice for dissolving the said copartnership, as to the partner or partners resident at such last-mentioned place; and the said notice shall be considered as commencing from the time at which the last of the said letters shall have been put into the post office as aforesaid; and at the expiration of such notice, or at any subsequent time to be named therein, the said co-

(*b*) This clause is unnecessary, being merely expressive of the rule which obtains in such cases in the absence of express stipulation. (*Vide ante*, p. 21).

partnership concern shall absolutely cease and determine as to all the said partners, and the same account, division, and payment shall thereupon be made as is before directed at the end of the term. In witness, &c.

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ARTICLES *of* PARTNERSHIP *between Two* Traders, *with* ordinary Clauses: Profits *to* accumulate *until* Capital *is of a* certain Amount. *(A very concise Form)* (*a*).

BETWEEN TWO TRADERS.

ARTICLES of AGREEMENT, made &c., Between [A. B.] of &c., of the one part; and [C. D.] of &c., of the other part: Whereas the said [A. B.] and [C. D.] have lately carried on in copartnership the business of —— at ——, and they are desirous of entering into articles of copartnership for the period and on the terms and conditions after mentioned: NOW THESE PRESENTS WITNESS, That each of them the said [A. B.] and [C. D.] doth hereby, for himself, his heirs, executors, and administrators, covenant with the other of them, his executors and administrators, in manner following, (that is to say):

Parties.

Testatum.

I. That they the said [A. B.] and [C. D.] shall and will continue to be copartners in the said trade or business of ——, and carry on the same at ——, for the term of —— years, commencing and to be computed from the —— day of ——, under the firm of ——; which firm the said parties hereto respectively are hereby authorized to make use of in all matters wherein the joint business is concerned, but not otherwise.

Duration and style of partnership.

II. That the capital of the said joint trade shall consist of the stock and capital as now brought in and employed in the same, but subject to the respective claims of each partner as now appearing in the books of account of the said concern, and that any further capital that may be necessary,

Capital.

(*a*) This precedent has been given, not so much on account of any peculiarity in its provisions, as for its succinctness.

BETWEEN TWO TRADERS.

shall be advanced by the said parties in the proportio n following (that is to say): Two thirds by the said [A. B.] and one third by the said [C. D.]; And that if either of the said parties, with the consent of the other, shall lend to the said joint trade any money beyond his proportionate share, or shall already be in advance in respect thereof, the capital stock and profits shall be chargeable therewith to the party lending the same as far as in equity the same ought to be chargeable, together with interest, at the rate of *5l. per cent. per annum.*

Profits to be carried to account.

III. That the profits of the said concern, after deducting all costs, charges, and expenses attendant upon the said business, and after payment of interest on the advances of the said parties respectively as aforesaid, shall be divided between the said parties, or carried to the credit of their respective accounts in the proportions following, (that is to say): The said [A. B.] two thirds, and the said [C. D.] one third, and the losses shall be borne by them in the same proportions.

Not to be drawn out until the capital is of a certain amount.

IV. That neither of the said parties shall draw out any part of the profits of the said concern without the consent in writing of the other of them, until the capital shall exceed the sum of £——, which sum of £—— shall be set apart during the term of the said copartnership as a joint capital for the purposes of the said concern: But when the capital shall exceed the said sum of £——, then either party shall be at liberty to draw out the whole or any part of his share of gain or profit appearing to his credit, but so as to leave a capital of at least £—— for the general purposes of the concern.

Partners to be faithful, &c.

V. That the said parties will be true and faithful to each other in all their dealings, and that neither will, on the credit of the said firm, make or enter into any purchase, speculation, contract, engagement, or transaction, or make any payment, advance, or other application of any of the money or funds of the said concern, above the amount of £——, without the consent of the other of them.

Not to use partnership name for private purposes.

VI. That neither of them will for his own use, or for any other purpose than the immediate use of the concern, draw, accept, or indorse any bill or bills of exchange, promissory note or notes, or enter into any other engagement

by which the partnership shall or may be bound, or become liable to pay any of the joint money or effects, on pain of forfeiting treble the amount to the other, to be deducted from the share of gains or capital of the offending party, or recovered by an action at law.

Books of account.

VII. THAT for carrying on the said business, proper books of account shall be kept at the counting-house of the said parties; in which books shall be entered from time to time the copartnership dealings and transactions, and all such entries and statements as shall be necessary to elucidate the transactions of the concern and the accounts thereof; and to which books of account the said parties respectively, and their respective executors and administrators, and any other person or persons by them authorized, shall have free access either for inspection or for taking copies thereof.

Annual account.

VIII. THAT, on the —— day of —— in each year, or as nearly after as may be, a particular statement or account, in writing, shall be made out, of the property, debts, effects, gains, losses, and state of the concern, and shall be subscribed by each party, and entered into a book to be kept for that purpose, which account shall not afterwards be called in question, unless some manifest error be found therein to the amount of £——, and then only for the purpose of rectifying the same.

Final account at dissolution.

IX. THAT within three calendar months after the expiration of the said term of seven years, or the sooner determination of the said partnership, an account shall be stated, and the several dealings and transactions of the concern wound up, and all the partnership debts discharged; and each of the parties shall pay and render to the other, his executors, administrators, or assigns, his proper share of the money from time to time received, until the claim of each shall be extinguished.

Provision for the event of death.

X. THAT, if either of the said parties shall die before the expiration of the said term of seven years, the executors or administrators of the party so dying, or any person that may be appointed by the last will and testament of the party so dying to succeed him in the said copartnership, shall have the option of carrying on the business and concern in copartnership with such surviving partner until the expiration of

BETWEEN TWO TRADERS.

the said term, or of closing the same at any earlier period, as he or they may think most advisable; but if such executors, administrators, or person so to be appointed as aforesaid, shall be desirous of putting an end to the partnership before the expiration of the said term, they or he shall give to the surviving partner —— calendar months' notice, in writing, of such intention; and, on the expiration of the time to be limited in such notice, the said partnership shall cease, and the like account shall be made and stated, and division made, as directed at the end of the said term.

Power to either partner of determining the partnership, on certain acts by the other.

XI. THAT if either of the said parties shall be declared a bankrupt (though the commission shall afterwards be superseded), or shall file any petition for the purpose of taking the benefit of any insolvent debtors' act, or enter into any general composition with his creditors, or the greater part in value thereof, or shall for his own use or for any other purpose than the immediate use of the concern, draw, accept, or indorse any bill or bills of exchange, or promissory note or notes, in the name of the firm, or shall suffer his share in the partnership effects to be attached or taken in execution for any private debt, it shall be lawful for the other of them, at any time within —— days after the same shall come to his knowledge, to give to the party so acting notice in writing, by leaving the same at his last place of abode, announcing a dissolution of the said copartnership; and thereupon the said copartnership shall determine, in the same manner as if the whole of the said term had expired; and the party giving such notice shall be at liberty to insert a notice of such dissolution in the London Gazette, and any other public paper or papers whatsoever, and, as the attorney of the other party, to subscribe and affix the name of the said other party, as well as his own, to any such notice; and the said authority hereby given for that purpose, the parties hereto respectively agree, that they will not revoke, or attempt to revoke, whether such authority be in its nature revocable or not. *(Arbitration clause.)* IN WITNESS, &c.

DEED *of* PARTNERSHIP *between* COAL MERCHANTS (*a*); *with (in addition to ordinary Clauses) Provisions that, in case of the* DEATH *of* EITHER PARTNER, *the* SURVIVOR *shall* CARRY *on the* BUSINESS, *and* ALLOW *the* REPRESENTATIVES *of the* DECEASED PARTNER *an* ANNUAL SUM *in* LIEU *of* PROFITS (*b*).

BETWEEN COAL MERCHANTS.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, BETWEEN [A.], of ——, London, coal factor, of the one part; and [B.], of——, in London, Parties.

(*a*) Partnerships in the coal trade are under a statutory restriction in regard to the number of the partners, the stat. 28 Geo. 3, c. 53, s. 2, declaring—"That any number of persons united in covenants or partnerships, or in any way whatsoever, consisting of more than five persons, for the purchasing of coals for sale, or for making regulations with respect to carrying on the said trade in coals, shall be deemed and adjudged to be an unlawful combination to advance the price of coals." Restrictions of this nature, however, are fast dying away, and non-interference in matters of trade, beyond what fiscal purposes, or the protection of vested rights, render absolutely necessary, is generally admitted to be the truest policy of states. One restriction lately abolished is that which existed under stat. 6 Geo. 1, c. 118, preventing persons in partnership from underwriting policies of marine insurance, or lending money by way of bottomry. See stat. 5 Geo. 4, c. 114.

Statutory restrictions on partnerships between coal merchants.

(*b*) This precedent recommends itself by the great clearness and accuracy with which the ordinary partnership provisions are expressed, avoiding, on the one hand, the affected and dangerous brevity which rejects the use of all technical language, and, on the other, the tedious prolixity which oftener obscures than elucidates the meaning. In no species of instrument, perhaps, is the improvement in the language of modern conveyancing more conspicuous than in partnership articles, which have been considerably divested of that cumbrous accumulation of tautologous words, in which it was formerly the practice to declare the intention of the parties, even in regard to the most minute particulars of mercantile arrangement.

BETWEEN COAL MERCHANTS. *Testatum.*

coal merchant, of the other part: WITNESSETH, that each of them the said [A.] and [B.], so far as relates to the observance and performance by him, his heirs, executors, and administrators, of the covenants and agreements hereinafter contained, doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the other of them, his executors and administrators, in manner following, (that is to say):

Commencement and duration of partnership.

THAT the said [A.] and [B.] will be partners in the trade or business of coal factors for the term of ten years from the —— day of —— next ensuing.

Place of business.

THAT the trade or business of the said partnership shall be carried on at the Coal Exchange, London, or at such other place or places as the said partners may agree upon.

Stile of firm.

THAT the firm of the said partnership shall be [A. & B.].

Capital.

THAT the capital of the said partnership shall be the sum of £——, which shall on no account or pretence whatsoever be diminished (except by mutual consent), and shall be made up and brought into the said partnership at the time and in the manner hereinafter mentioned, (that is to say): The sum of £——, part thereof, to be brought in by the said [A.] as and when the same may be necessary for the business of the said partnership, and the sum of £——, the residue thereof, to be brought in by the said [B.] in manner following, (that is to say): The sum of £——, part thereof, in money on the —— day of —— next, and the three vessels, respectively called the Hope, the Good Intent, and the Perseverance, belonging to the said [B.], which it is agreed shall become the property of the said partnership, and are to be brought in by the said [B.] as farther part of his advance of capital, at the sum at which the same shall be valued by two indifferent persons, one to be appointed by the said [A.], and the other to be appointed by the said [B.]; or, in case the said two persons shall not agree in such valuation, by such third person as they shall appoint as their umpire; and if the sum at which the said vessels shall be valued shall exceed £——, the surplus shall be paid out of the capital of the said business to the said [B.]; and if such sum shall not amount to the sum of £——, the residue of the said £—— shall be brought in by the said [B.] on or before the —— day of —— next.

Certain vessels belonging to [B.] to be valued, and the value considered as part of his advance of capital.

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That the said capital shall be employed in the business of the said partnership, and the said partners shall be entitled to the said capital, in the proportions in which the same shall, for the time being, have been brought in by them as aforesaid, and shall be entitled to the net gains and profits of the said business, in the shares following, (that is to say): The said [A.] to seven equal eleventh parts thereof, and the said [B.] to the remaining or other four equal eleventh parts thereof. That the rent of the offices where the business of the said partnership shall be carried on, and all repairs and taxes, the salaries of all clerks, servants, and all other necessary expenses which shall be incurred in the business of the said copartnership, and all debts to become due on account of the same, and all losses which may happen in the said business, and interest on all monies to be hereafter borrowed by the said partnership, and on the shares of the said partners respectively in the said capital, after the rate of *5l. per cent. per annum* (which is hereby agreed to be allowed to them respectively), shall be paid out of the profits of the said partnership, or, in case the same shall be deficient, then by the said [A.] and [B.], their respective executors or administrators, in the shares following, (that is to say): Seven equal eleventh parts thereof by the said [A.], his executors or administrators, and the other four equal parts thereof by the said [B.], his executors or administrators.

Shares of the respective partners in the capital and profits.

That, from the commencement of the said partnership, it shall be lawful for each of the said partners respectively to receive, out of the net profits of the business, by monthly payments, on the last day of each calendar month, by way of subsistence money, the sums following, (that is to say): the said [A.] the sum of £——, and the said [B.] the sum of £——, and the said sums respectively, at the times of taking out the same, shall be entered in the cash-book belonging to the partnership, and carried to the debit of the respective accounts of the said partners, in part of their shares of the profits of the said business.

Monthly allowance to partners.

That, if either of the said partners, with the consent of the other of them, shall bring into the said business any sum or sums of money, over and above his respective share of the said capital of £——, the same shall be entered in the cash-

Interest to be allowed on further advance of capital.

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book of the said partnership, as a debt due therefrom to the partner lending the same, and shall be a charge upon the partnership estate, and carry interest after the rate of *5l. per cent. per annum*, which shall be paid by half-yearly payments; and if the party lending any such money shall neglect to take back the same, upon receiving three calendar months' previous notice in writing from the other partner, interest thereon shall cease from the expiration of such notice.

Books, &c. to be kept at counting-house.

THAT proper books of account shall be kept by the said partners, in which all transactions relating to the said partnership business shall be duly entered, and such books, together with all bills, letters, and other writings, which shall from time to time concern the said partnership business, shall be kept at the counting-house of the said partnership.

Each party to have free access thereto.

THAT each of the said partners shall have free access to examine and copy out, or take extracts from, the cash-book, and all other the books and writings of the partnership, without any hindrance by the other of them.

One partner to devote his whole time, the other not.

THAT the said [B.] shall, at all times during the continuance of the said partnership, diligently employ himself in and about the business thereof, and carry on and manage the same for its greatest benefit and advantage; but the said [A.] shall not be obliged to attend to the said business any farther or otherwise than he shall think proper.

Each to be faithful, &c.

THAT each of them the said [A.] and [B.] shall be faithful to the other of them in all transactions relating to the said partnership, and give a true account of the same, and of all letters and things which may come to his hands or knowledge concerning the said partnership, to the other respectively, as often as the same shall be required.

Neither party to engage in any other trade, except that [A.] may retain shares of ships.

THAT neither of them the said [A.] and [B.] shall, directly or indirectly, engage in any other than the business of the said partnership, without the consent in writing of the other of them; it being understood, nevertheless, that the said [A.] may retain any shares or parts of ships he at present holds.

Neither to employ partnership monies, except for joint purposes.

THAT neither of them the said [A.] and [B.] shall, without the consent of the other of them, employ any of the monies or effects of the said partnership, or engage the credit thereof, except upon the account of the business of the said partnership.

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THAT neither of them the said [A.] and [B.] shall lend any money, or deliver upon credit any coals or goods belonging to the said partnership, to any person or persons whom the other of them shall have previously forbidden him, by notice in writing, to trust.

Not to lend any money, &c. to any person forbidden to be trusted by the other.

THAT neither of them the said [A.] and [B.] shall buy or engage in any contract respecting any articles, except coals, exceeding the value of —— hundred pounds, without the consent of the other of them.

Not to engage in any contract respecting articles, except coals, beyond a certain value.

THAT neither of them the said [A.] and [B.] shall take any apprentice, or hire or keep any clerk or servant in the business of the said partnership, against the consent of the other of them, except that either partner shall be at liberty to introduce a son into the office of the said partnership, who shall have attained the age of fifteen years, but no salary shall be allowed to such son without the consent of the other partner.

Not to take apprentices, &c. against consent.

THAT neither of them the said [A.] and [B.] shall, without the consent of the other of them in writing first had and obtained, enter into any bond, or become bound as bail, surety, or security, or subscribe any policy of assurance (except on cargoes addressed to the said partnership), or accept any bill in the name of the said firm except for the purposes of the said trade.

Not to enter into any bond.

THAT neither of them the said [A.] and [B.] shall do or suffer any act or thing, whereby the stock or effects of the said partnership, or his share or interest therein (*c*), may be taken in execution for his private debts.

THAT each of them the said [A.] and [B.] shall punctually discharge the debts now owing, or hereafter to be due from him, and indemnify the other of them, his heirs, executors, and administrators, and the stock and effects of the said partnership, from all his private debts and engagements, and all actions, suits, damages, and expenses, on account thereof.

To pay their respective debts.

THAT, on the first day of July next ensuing, and on every succeeding first day of January and first day of July, during the said partnership, a general account and rest in writing

Annual account to be taken.

(*c*) See an observation, *ante*, p. 176. This covenant may be useful as entitling the covenantee to damages on account of the injury sustained by the concern from one partner allowing his share to be taken in execution.

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shall be made of all such business as shall have been transacted by the said partners, and of all their stock, coals, vessels, monies, credits, and effects, and of all such other things as are usually comprehended in annual accounts of the like nature; and that a just valuation shall be made of all such particulars included in such account as are susceptible of valuation; and that a fair copy of the said general account, or rest, and valuation, shall be entered in two books, and be signed in each of the said books by the said [A.] and [B.], respectively, within two calendar months after the approval of every such account; and that, after such signature, each of the said partners shall take one of the said books, and be bound thereby, unless some manifest error, to the amount of 100*l.* shall be found therein, and signified by either of the said parties to the other of them, in which case, such error, not being less than 100*l.*, shall be rectified; and as soon after the finishing of every such account respectively as the same can conveniently be paid, the gains and profits which shall have arisen by the business of the said partnership during the time to which such accounting shall extend, shall be divided between the said parties in the proportions hereinbefore mentioned, unless either of the said parties shall, with the consent of the other of them, agree to leave such profits, or any part or parts thereof, in the said business at interest at the rate aforesaid.

Final account and division to be made at the dissolution.

That within six calendar months after the expiration of the said term of ten years, a full account, in writing, shall be made and settled of all the stock in trade, monies, credits, and effects belonging to, and all the debts due from, the said copartnership; and thereupon the said partners shall forthwith pay or make due provision for the payment of the debts owing by the said partnership; and the balance of the said copartnership capital and effects, and the profits thereof, or other the matters to be included in such general account, shall be divided between the said [A.] and [B.], their respective executors, administrators, and assigns, in the proportions hereinbefore mentioned; And after making such division, such instrument, in *writing, shall be executed by the said partners respectively for getting in the credits and effects outstanding, and for indemnifying each other concerning the premises, and for vesting the whole property in the said re-

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spective shares of and in the said capital and effects in each of the said partners to whom respectively the same shall, upon such division, belong, and for releasing to each other all claims on account of the said partnership as are usual in cases of the like nature; such instruments respectively to be at the expense of the person requiring the same; and if any question shall arise as to the propriety of any instrument, or of any clause or provision therein required by either party, such question shall be referred to the senior counsel practising in the Court of Chancery who will consent to give an opinion therein.

In case of the death of either, the business to be carried on by the survivor.

THAT in case either of them the said [A.] and [B.] shall depart this life during the said partnership, the survivor of them shall carry on the said business until the expiration of the said term of ten years, if he shall so long live, under the firm of the said copartnership.

Certain allowance in lieu of profits to be made to the executors or administrators of the deceased partner.

THAT the surviving partner shall pay to the executors or administrators of the deceased partner during the remainder of the said term of ten years, if such survivor shall so long live, in lieu of the share of the deceased partner in the profits of the said partnership (exclusive of the interest on his share of the capital thereof), the annuity hereinafter mentioned, (that is to say): If the deceased partner shall be the said [A.], an annuity of 800*l.*; and if the deceased partner shall be the said [B.], an annuity of 400*l.*, the said annuity respectively to be paid by two equal half yearly payments on the first day of January and the first day of July, in every year; the first payment of the said annuity to be made on such of the said days as shall first happen after the decease of the partner so dying, and to be instead of an half yearly payment of a proportional part of the profits from the time of the last division of profits of the business of the said partnership previously to such decease (*d*).

(*d*) This annuity, being expressly given in lieu of the deceased partner's share of profits, would probably be held to be payable only to the extent of such profits. It is better, however, explicitly to declare this to be the intention of the parties, however improbable may be the event of the deficiency:—

Annuity to be

"That if the entire profits of the said business to be carried

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Capital of the deceased partner to be left in the trade.

THAT the capital of the deceased partner shall remain in the said partnership until the expiration of the said term of ten years (if the surviving partner shall so long live), and the executors or administrators of the deceased partner shall stand in his place in respect of the same, and be entitled to the interest thereof: but if the said [A.] shall first depart this life, and his executors or administrators shall require the whole or any part of his share of the said capital not exceeding the sum of £——, the same shall be paid out to them at such time or times as they shall require the same, upon giving six calendar months' notice, in writing, to the said [B.].

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Executors or administrators of deceased partner may inspect books, but not further to interfere.

*THAT the executors or administrators of the party first dying shall be at liberty to inspect, examine, and copy, and take extracts from the books of the said partnership, at all reasonable times, and to introduce any son or sons of the

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reduced if profits not equal to it.

on by the surviving partner as aforesaid shall in any year or years fall short of the said annuity hereinbefore stipulated to be paid to the executors or administrators of the deceased partner, then such executors or administrators shall be entitled, for the year or years in which such deficiency shall arise, to a sum equal to the amount of such profits only in lieu and satisfaction of the said annuity."

And add, if so intended—

But losses to fall exclusively on survivor.

"But it is nevertheless declared, that in case it should happen by reason of unexpected misfortunes befalling the said trade, that the losses thereof in any year or years shall have exceeded the profits thereof during such period, the excess of such losses shall be borne by the surviving partner, exclusively, out of his share of the capital in the said copartnership, and no part thereof shall be contributed by the representatives of the deceased partner *(or otherwise as the case may be)*.

Without providing for these events, the stipulation in the text respecting the annuity to be paid to the representatives of a deceased partner is very likely to lead to questions of this nature. The receipt of this annuity *out of the profits* would clearly make the executors or administrators partners, and, therefore, no objection could be raised to it as a contract to pay more than *5l. per cent.*, by way of interest, on the deceased partner's share of capital left in the business. As to this *vide ante*, p. 165.

deceased partner, of the age of fifteen years or upwards, into the office of the surviving partner as a clerk, but shall not otherwise interfere with the said business. BETWEEN COAL MERCHANTS.

THAT at the expiration of the said term of ten years, or the death of the surviving partner, which shall first happen, all such accounts, division, acts, deeds, and things, shall be taken, made, done, and executed between the surviving partner and the executors or administrators of the deceased partner, or their respective executors or administrators, as are hereinbefore agreed to be taken, made, done, and executed, at the expiration of the said partnership, by the said partners, if both of them shall be living, or as near thereto as circumstances will permit. Arrangements to be made at the end of the term.

THAT, if any difference shall at any time arise between the said [A.] and [B.], or between either of them and the executors or administrators of the other of them, or between their respective executors or administrators, in anywise relating to these presents, on any account or valuation to be made as aforesaid, or otherwise concerning the said partnership, which shall not be decided within one calendar month; then, as often as the same shall happen, such difference shall, at the request of either of them, or the executors or administrators of either of them, be reduced into writing, and be referred to the award of three indifferent persons, two to be chosen by the persons differing as aforesaid, and a third by the persons first chosen, within two calendar months next after such request, and the award of such three persons, or any two of them, in the matter referred to them, shall be conclusive upon the said parties, if made in writing within twenty-eight days after all the said three persons shall have been elected as aforesaid, or within such further reasonable time as the said arbitrators shall appoint for making the award; That if any of the said parties, his executors or administrators, shall refuse or neglect to choose an arbitrator on his or their behalf, for the space of two calendar months after any other of them shall have requested him or them to refer any difference to arbitration, it shall be lawful for the person *chosen arbitrator by the person or persons making [*214] such request to choose an arbitrator on the part of the person or persons refusing or neglecting, whereof notice shall be immediately sent to the person or persons refusing or Arbitration clause.

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neglecting; and that the two persons chosen arbitrators as last aforesaid shall choose an umpire, and the award or umpirage of the persons so chosen as lastly hereinbefore mentioned, or any two of them, shall be as effectual and conclusive as if the person chosen arbitrator by the arbitrator of the person or persons requesting as aforesaid, on behalf of the person or persons refusing or neglecting as aforesaid, had been actually chosen by him or them.

That, for the better enforcing any award to be made as aforesaid, the reference or submission in respect of the same shall be made a rule of one of his Majesty's Courts of King's Bench, Common Pleas, or Plea side of the Exchequer, according to the statute in that case provided. In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

BETWEEN CHEMISTS AND DRUGGISTS.

DEED *of* PARTNERSHIP *between* Chemists *and* Druggists (*a*): *(In addition to ordinary Clauses)*, Special Provision *respecting a* deceased Partner's Share *in the event of the* surviving Partner entering *into* Partnership *with a* Relative *of the* deceased: *Distinct Provision for the event of such* Partnership *being* declined *by either Party.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [A. A.], of —— street, in the county of Middlesex, chemist and druggist, of the

[*215] *one part; and [B. B.], of the same place, chemist and druggist, of the other part:

Recital.

Whereas the said [A. A.] and [B. B.] have mutually agreed to become partners together in the trade or business of chemists and druggists as hereinafter expressed.

Testatum.

NOW THIS INDENTURE WIT-

(*a*) This precedent (and the observation applies to many of the others), is applicable to any ordinary business.

BETWEEN CHEMISTS AND DRUGGISTS.

NESSETH, That each of them the said [A. A.] and [B. B.] doth hereby for himself, his heirs, executors, and administrators covenant and agree with the other of them, his executors and administrators, in manner following, (that is to say):—

Nature of business and term of partnership.

That they the said [A. A.] and [B. B.] will be and become partners in the said trade or business of chemists and druggists for the term of seven years, to commence and be computed from the —— day of ——, ——.

Style of firm.

That the said partnership shall be carried on under the style or firm of [A. & B.], and upon, and under, and subject to the terms, conditions, and agreements following, (that is to say):—

Capital, how to be brought in.

That the said [A. A.] shall advance and bring into the said partnership business such capital as shall be necessary for conducting the same, to the extent of £——; and if it shall be found requisite to increase the capital thereof beyond the said sum of £——, then such additional capital shall be advanced by the said parties respectively, in equal proportions.

Capital to be employed in business.

That all such capital to be advanced and brought into the said partnership as aforesaid, and all profit and gains thereof, shall be joint stock of the said partnership, and shall be employed therein to the greatest benefit and advantage; and no part thereof, except as hereinafter provided, shall be taken out of the said partnership by either of the parties during the continuance of the said partnership.

Shares of the partners in capital.

That the said capital so to be advanced and brought into the said partnership as aforesaid shall belong to the said parties respectively, according to the amounts and in the proportions in which the same shall be advanced and brought into the said partnership by them respectively as aforesaid.

Interest to be allowed, except on a certain advance by one partner.

That the said [A. A.] shall not be allowed or paid any interest on capital to the extent of the sum of £—— to be contributed by him as aforesaid, but, subject thereto, the *said parties respectively shall be allowed and paid interest on the respective sums which shall be so advanced by them respectively, from the time or respective times of the same being so advanced or brought into the said partnership, whilst the same shall continue in the said partnership; and

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BETWEEN CHEMISTS AND DRUGGISTS.

such interest shall be paid to the said parties respectively on the —— day of —— in every year, and shall be paid out of the profits of the said partnership; or, in case such profits shall be insufficient, the deficiency shall be borne and paid by the said parties respectively in the same proportions and in like manner as any other debt to be contracted by the said partnership.

Shares of the partners in the profits.

That, subject to the other provisions of these presents, the said parties respectively shall be interested in the capital stock and property of the said partnership, and all gains and profits thereof, in the shares and proportions following, (that is to say): The said [A. A.] in three equal fifth parts or shares thereof, and the said [B. B.] in the remaining two equal fifth parts or shares thereof.

Place of business.

That the business of the said partnership shall be carried on in the present counting-house, shop, and premises of the said [A. A.], in —— street aforesaid, or in such other place or places as the said parties shall from time to time mutually agree upon: and during such time as the said partnership business shall be carried on in the said counting-house, shop, and premises in —— street aforesaid, the said [A. A.] shall be allowed and paid out of the partnership funds the yearly sum of £—— for and in lieu of all rent, taxes, and repairs for and in respect of the said counting-house, shop, and premises, and for the cleaning thereof; and the said [A. A.], in consideration thereof, shall and will pay and discharge all rent and taxes, which, during the period aforesaid, shall be payable in respect of the said counting-house, shop, and premises, and all expenses of necessary repairs of the same, and shall cause the same to be cleaned from time to time (*b*).

(*b*) If the premises belong to A. A., and it is intended that he shall grant a lease of them, say—

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One of the partners to grant a lease.

"That the said [A. A.] shall, on the request of the said [B. B.], and at the expense of the said partnership, grant a lease of the said counting-house, shop, and premises to a nominee of the said partners respectively, in trust for the said partnership, for the term of —— years, at the clear yearly rent of £——, to commence from the —— day of ——, and to be payable half yearly, clear of all taxes and

BETWEEN CHEMISTS AND DRUGGISTS.

THAT all wages of clerks and servants to be employed in the said business, and all other expenses incident to the carrying on of the said business, and all expenses of insuring the stock and property of the said partnership from damage by fire, and all losses which may happen of or to the property of the said partnership, or to the said parties in respect thereof, by bad debts, decay, loss of goods, or otherwise (*c*), shall be borne and paid by and out of the gains and profits of the said partnership business; and in case the said gains and profits shall not be sufficient for those purposes, then the deficiency shall be paid and made good by the said parties respectively, in the proportions in which they respectively are interested in the said profits and gains as aforesaid, (that is to say): Three fifth parts thereof by the said [A. A.], and the remaining two fifth parts thereof by the said [B. B.].

Expenses of partnership, how to be paid.

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*[(*d*) THAT the said partnership business shall be carried on, and all purchases, sales, bills of parcels, contracts, let-

Partnership transactions to

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other deductions; and the said partnership shall be bound to keep the said premises in good and tenantable repair; which said rent shall be paid to the said [A. A.] out of the partnership funds when and as the same shall become due, and the said [A. A.] shall be entitled to retain and deduct the same out of any monies which shall come to his hands belonging to the said partnership."

If the partnership deed contains a stipulation which would operate as an immediate letting, it should seem that this would subject the instrument to a lease stamp.

(*c*) This detail of articles of expenditure is quite unnecessary, and the clause may be shortly expressed as follows:—

"That all expenses incident to the said partnership business, and all losses incurred therein, shall be paid out of the profits of the said business; and if such profits shall be insufficient for the purpose, then by the said parties respectively, in the proportions in which they are interested in the said profits, (that is to say): Three fifth parts by the said [A. A.], and the remaining two fifth parts by the said [B. B.]."

(*d*) The clauses within brackets, though usual, may safely be dispensed with.

BETWEEN CHEMISTS AND DRUGGISTS.

be in the name of firm.

ters, bills, notes, securities, receipts, payments, dealings, and transactions whatsoever in anywise concerning the same, shall be made, written, entered into, executed, taken, received, and done in the name of the said firm, and not otherwise.]

Bonds or deeds to be executed by both the partners.

[That, in case the parties shall find it necessary to execute any bond or deed for any purpose relative to their said partnership, the same shall be executed by both the said parties, and if either of them shall alone execute any such bond or deed without the consent and authority of the other of them, every such bond or deed shall be deemed to have been so executed on the separate account of the party executing the same; And the said partnership, or the property thereof, shall not in any manner be charged or liable on account thereof; and the party so executing the same shall indemnify and save harmless the other party and the partnership property therefrom, and from all the consequences thereof.]

Books of account to be kept.

That proper books of account shall be kept and provided by the said parties, wherein they or their apprentices, clerks, or servants, shall and will daily enter a regular account of all cash and other transactions relative to the said partnership business, and the concerns of the said partnership in general, as is usual in the said trade; and which books, and all deeds, securities, papers, and writings whatsoever belonging or relating to the said partnership, shall be kept in the counting-house of the said parties, or with their bankers, or in such other place or places of safety as they shall mutually agree on; and the said parties respectively shall be, at seasonable times, at liberty to resort to the same books, deeds, securities, papers, and writings, and to examine and inspect the same, and take copies thereof, and extracts
[*219] therefrom; and *neither of the said parties shall or will secrete or remove the same, or any of them, without the consent of the other of them.

Parties to be faithful, &c., and not to give credit, &c.

[That the said parties shall be just, true, and faithful to each other, and consult with each other on all affairs of importance relative to the said partnership, and endeavour by all means in their power to advance and promote the same]; and that neither of the said parties shall or will, without the consent of the other of them, from time to time,

BETWEEN CHEMISTS AND DRUGGISTS.

first obtained, trust or give credit to, or enter into any contract with any person or persons, or do any other act or thing whatsoever, whereby any one person, or several persons (being in partnership) may become indebted to the said partnership beyond the sum of 200*l.*, or whereby the said partnership may become bound, liable, or engaged, or otherwise affected in anywise at any one time, without such consent as aforesaid, beyond the sum of 200*l.*; nor trust or give any credit whatsoever to any person whom the other of them shall have forwarned him not to trust or give credit to; nor (without the consent of the other of them first obtained) lend any of the monies or effects of the said partnership, nor compound any debt owing thereto, or sign any bankrupt's certificate, or any insolvent's release, discharge, or letter of license, or give any receipt or acknowledgment for money or property which the said partnership shall not actually and *bonâ fide* have received.

Neither partner to carry on any other trade.

THAT neither of the said parties shall, directly or indirectly, separately carry on or be concerned in the trade or business of a chemist and druggist, or any other trade or business whatsoever, during this copartnership, but for the benefit and advantage, and on the account only of this partnership; And in case either of them shall so separately carry on any trade or business contrary to this agreement, then all benefit and advantage which shall arise, accrue, or be made thereby or therefrom, shall, if the other party so choose, but not otherwise, be considered as part of the profits and gains of the said partnership, and be disposed of and accounted for accordingly; but all loss or damage which shall happen by such separate trading or dealing shall be sustained and borne by such of the said parties *as shall carry on such separate trade contrary to this agreement.

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Annual allowance to each partner.

THAT the said parties shall be at liberty, from time to time during the said partnership hereby established, to receive yearly out of the same for their respective private use, and as part of their respective shares of profits, the several sums following, (that is to say): The said [A. A.] the annual sum of £——, and the said [B. B.], the annual sum of £——, but so as that neither of the said partners shall draw out more than one fourth part of his said annual allowance

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in any quarter of a year, and the sums so drawn out by them respectively shall be accounted for at the next annual settlement of accounts to be made as hereinafter mentioned.

No apprentice to be taken by either without the consent of the other.

[That no apprentice, clerk, or servant, shall be taken by either of the parties on account of the said partnership, nor any clerk or servant be discharged therefrom by either of the said parties, without the consent of the other of them first obtained; and all fees or premiums which may be received with any such apprentice taken with mutual consent, shall be added to and considered as part of the profits and gains of the said partnership business.]

Each to pay his own debts.

[That the said parties respectively shall and will pay and discharge their respective several debts and engagements already contracted and hereafter to be contracted, and indemnify and save harmless the other of them, and the said partnership effects, therefrom, and from all consequences of the same.]

Appointment of bankers.

[That Messrs. —— & Co., or such other bankers as the said parties shall mutually agree on, shall be the bankers of the said partnership, in whose hands shall be placed all such monies and securities, deeds, papers, and writings, as the said parties shall have occasion to deposit in bankers' hands, and on whom the said parties respectively shall be at liberty to draw cheques for the purposes of the said partnership.]

Annual account to be taken.

That, on the —— day of —— next ensuing, and so on every succeeding —— day of —— during the continuance of the said partnership, a general account, or rest, in writing, shall be made and taken by the said parties, of *all the partnership property and effects, and of all credits owing to the said partnership, and of all monies owing to either of the said parties in respect of advances made to the said partnership for capital or otherwise, and of all other debts owing by the said partnership, and of all other things usually included in accounts of the like nature; and a just valuation and appraisement shall then be made by the said parties, of all the property and effects included in such account, which can be properly appraised, and which accounts and valuations shall, from time to time, be fairly written, and entered in two books, and each of such books shall be signed by both the said parties, in testimony of

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their approbation thereof, within two calendar months next after the time appointed for the taking and making of every such account and valuation; and such accounts shall not afterwards be opened or unravelled, unless some error to the amount of 20*l.* shall appear therein, which may be rectified within one calendar month after the discovery of such error; but no other part of the said accounts shall be opened or unravelled: and, after the said books shall be so made up and signed as aforesaid, each of the said parties shall take one of them for his own use and benefit; and, on the making up of such accounts as aforesaid, from time to time, so much of the clear gains and profits of the said partnership business as the said parties shall mutually agree upon, after payment of all money due to either of the said parties, in respect of advances to the said partnership beyond the permanent capital thereof, and all other debts owing by the said partnership as aforesaid; and all monies which may be due to the said parties respectively, for interest on capital advanced, or provision made for the same, shall be divided between the said parties, in the proportions in which they are entitled to the same as aforesaid; and the surplus thereof shall from time to time be added to, and go in augmentation of the capital of the said partnership.

On certain acts by either partner, the other to have power to dissolve the partnership.

That if either of the said parties, without the consent of the other of them, shall make use of the partnership firm or credit, by drawing, accepting, indorsing, or negotiating any bill or bills of exchange, promissory note or notes of hand, or entering into any guarantee or other *engagement or undertaking, not *bonâ fide* relating to or concerning the said partnership trade and business, in the usual and customary course thereof; or shall refuse to come to or sign the annual accounts and settlement according to the stipulation hereinbefore contained; or shall withdraw or remove any of the books of account, papers, writings, vouchers, securities, or correspondence, of or belonging to the said partnership, from the counting-house or premises, at or in which the said trade or business shall be, for the time being, carried on as aforesaid, or other place of deposit, other than for the purposes of the said partnership, or in case of fire; or shall refuse access at all seasonable hours to the other of them, to such books of account, papers, writings, securities, vouch- [*222]

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ers, and correspondence, or any of them; or shall wilfully neglect or omit to make due and just entries in the partnership book or books, which shall be kept and provided for that purpose, of all sum or sums of money which such parties respectively shall at any time receive for or on account of, or from or out of, the said partnership, within seven days next after every such sum of money shall be so received by him as aforesaid; or be either directly or indirectly concerned in any trade or business, contrary to the stipulation of these presents; or be concerned in underwriting or subscribing any policy or policies of insurance of ships, or lives, or houses, or in stock-jobbing, or in any other speculations in the Government or other stocks, funds, or securities of this or any other country, or in any kind of illegal gaming whatsoever; or shall quit Great Britain for debt, or by reason of any illegal act charged to have been committed by such party; or shall cause, suffer, or permit the stock or effects of the said partnership, or any part thereof, or his share or interest therein, to be taken in execution to satisfy any private or separate debt, due and owing from such party; then, and in either of the said cases, it shall be lawful for the other of the said parties immediately thereupon, or at any time within fourteen days after notice or knowledge thereof, to dissolve and put an end to the said copartnership.

Power to dissolving partner to sign the name of the other to an advertisement in the London Gazette.

THAT in case either of the said parties, by virtue of the power hereby vested in him under the provisions hereinbefore expressed, shall dissolve and determine the said partnership, it shall be lawful for him, as the legally authorized attorney of the other of them, to sign and use the name of the said other party in and to any notice or notices of such dissolution, or relating thereto, to be inserted in the London Gazette, or any other public newspaper or newspapers, or to be sent to the connections and customers of the said partnership or otherwise, as the party so dissolving the said partnership may think prudent or necessary (*e*).

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Final account to be made at the dissolution.

THAT, on the expiration of the said partnership by effluxion of time, or on the dissolution thereof by either of the

(*e*) As to this, *vide ante*, p. 126.

BETWEEN CHEMISTS AND DRUGGISTS.

said parties pursuant to the power hereinbefore contained, a final general account or rest in writing, shall be made and taken by the said parties, of all the stock and property of the said partnership, and of all credits due and owing to the said partnership, and of all monies owing to the said parties respectively, in respect of capital or other advances made to the said partnership, and of all other debts owing by the said partnership; and thereupon, all monies due to the said parties, in respect of advances made to the partnership, over and beyond the permanent capital thereof, shall be paid: And then the capital which shall have been advanced by the parties respectively as aforesaid, and all interest then due in respect thereof, shall be repaid and satisfied to them respectively; and then all other debts owing in respect of the said partnership shall be paid; and for the purposes of such several payments as aforesaid, so much of the partnership property and effects as shall be necessary, or as the parties shall mutually agree upon, shall be sold, and the credits of the said partnership shall be collected and gotten in; And after such several payments as aforesaid, or provision made for the same, the residue of the partnership property, estate, monies, credits, and effects, shall be divided between the said parties, in the proportions in which they respectively are and will be entitled thereto, by virtue of these presents; And such of the outstanding credits and other *effects, as it shall be necessary to assign, in order to [*224] invest the entire interest therein in the person to whom the same shall, on such partition or division, belong, shall be assigned unto him by the other party interested in the same, at the expense of the person taking such assignment (*f*).

(*f*) It may be proper to add a provision to this effect:—

If the parties do not agree upon the division, outstanding credits to be gotten in.

"THAT if the said parties should not agree on the division to be made between them as aforesaid, of the said partnership property, estate, monies, credits, and effects, then, and in such case, the outstanding credits shall be collected and gotten in by some person to be mutually appointed by them, and who shall from time to time pay over the monies received by him as aforesaid, after deducting thereout his salary and all other the expenses attending the col-

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Messuage, &c., to be the property of [A. A.]

THAT, on the expiration of the said partnership by efluxion of time, or otherwise howsoever, the messuage and leasehold premises in —— street aforesaid, in which the said partnership business is intended to be carried on, shall revert to and be and become the sole property of the said [A. A.], (subject only, nevertheless, to the provision concerning the same hereinafter contained).

In case of the death of [B. B.], the credits to be collected, and his share in the stock, &c., to be taken by [A. A.] at a valuation.

THAT, if the said [B. B.] shall die during the continuance of the said partnership, then, and in such case, the affairs and concerns of the said partnership shall be thereupon wound up, adjusted, and settled, and the debts of the said partnership paid and discharged, and the partnership credits collected and gotten in, and the stock in trade and effects of the said partnership, except credits owing thereto and capital in hand, and except also the said lease of the said messuage and premises, which is to revert to the said [A. A.] as aforesaid, shall be valued, as on and from the day of the decease of the said [B. B.], by two proper persons, to [*225] be chosen one by the said [A. A.], and the *other by the executors or administrators of the said [B. B.], within seven days after request; or in case either party shall refuse or neglect to name such referee within seven days after request, then the other party shall name the referee for the party so neglecting or refusing; and such two referees, previously to their entering on the reference, shall choose an umpire to determine in case such two referees do not agree; And that the said [A. A.] shall, after the value of such share of the said [B. B.] shall have been so fixed as aforesaid, pay to the executors or administrators of the said [B. B.] the amount of such value, with interest thereon after the rate of five pounds for every one hundred pounds by the year, to be computed from the day of the decease of the said [B. B.], in

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lection thereof, to the said parties respectively, in the proportions in which they shall be respectively entitled thereto as aforesaid; and the residue of the said partnership property and effects shall, with all convenient speed, be sold and converted into money, and the monies arising therefrom shall from time to time be divided among the said parties, in such proportions as aforesaid."

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manner following, (that is to say): One equal half part of the said amount of such value, with the interest thereon, to be computed from the death of the said [B. B.], at the expiration of twelve calendar months from the death of the said [B. B.]; and the remaining half part of the amount of such value, with interest thereon as aforesaid, at the expiration of eighteen calendar months from the death of the said [B. B.]; And that the said [A. A.] shall, within one calendar month after such valuation made, give and execute, at his own costs, to the executors or administrators of the said [B. B.], his bond (*g*), in a penalty double the amount of the principal secured, for the payment of the amount of such value and interest accordingly, by the instalments aforesaid: And the said [A. A.] shall thereupon have, take, and be entitled to the share, right, and interest of the said [B. B.] in the said property and effects of the said partnership, and the profits and gains thereof, from the decease of the said [B. B.] (*h*).

Amount of valuation to be secured by bond.

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*THAT if the said [A. A.] shall depart this life during the continuance of the said copartnership, then, and in such case, the affairs and concerns of the said partnership shall be thereupon wound up, settled, and adjusted, and the debts of the said partnership paid and discharged, and the partnership credits collected and gotten in as aforesaid; and then, and in such case, and if the said [B. B.] shall choose and be desirous to carry on and continue the said business in partnership with [C. C.], of ——, the nephew of the said [A. A.], they the said [B. B.] and the said [C. C.] shall and may be at liberty to purchase and take at a fair va-

In case of [A. A.'s] death, and [B. B.] takes [A. A's] nephew into partnership, they may purchase [A. A's] share at a valuation.

(*g*) If with a surety, say—

"the joint and several bond of the said [A. A.], and of a surety to be approved by the executors or administrators of the said [B. B.]."

(*h*) This arrangement, it will be seen, differs from that in most of the former precedents, in which the surviving partner purchases all the effects including the credits of the partnership, and takes upon himself the payment of the engagements of the concern, giving to the executors or administrators of the deceased partner a bond of indemnity against such engagements. Here the credits are to be collected on their joint account, and the debts paid, and the surviving partner takes to the remainder of the property at a valuation. In such case it is obvious no indemnity is requisite.

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luation, to be made by proper persons to be chosen as follows, *viz.* one by the said [B. B.] and [C. C.], and the other by the executors or administrators of the said [A. A.], within seven days after request; and in case either party refuse or neglect to name such referee within seven days after request as aforesaid, then the other party or parties shall name such referee for the party or parties so neglecting or refusing; and such two referees, previously to their entering on such reference, shall choose an umpire to determine, in case the two referees do not agree, the share and interest of the said [A. A.] of and in the said partnership stock, property, and effects, except credits due thereto and capital in hand, but together also with the interest of the executors or administrators of the said [A. A.] in and to the said leasehold premises in which the said partnership business is intended to be carried on, if such business shall, at the decease of the said [A. A.], be carried on therein; And then, and in such case, they the said [B. B.] and [C. C.] shall, after such value of the said share and interest of the said [A. A.] shall have been so fixed, pay to the executors or administrators of the said [A. A.] the amount of such value, with interest thereon, at and after the rate *of five pounds *per cent. per annum*, from the day of the decease of the said [A. A.], in manner following, (that is to say), one equal third part of the amount of such value, with interest thereon from such decease, at the expiration of three years after such death of the said [A. A.]; one other equal third part thereof, with interest thereon as aforesaid, at the expiration of four years after such death of the said [A. A.]; and the remaining equal third part thereof, with interest thereon as aforesaid, at the expiration of five years after such death of the said [A. A.]; and shall, within one calendar month after such valuation, give and execute to the executors or administrators of the said [A. A.] their joint and several bond, in a penalty double the amount of the principal money secured, for the payment of the amount of such value and interest accordingly; and thereupon they shall have, and take, and be entitled to all the share, right, and interest of the said [A. A.], in and to the said partnership property and effects, and the gains and profits thereof, from the decease of the said [A. A.], and the said leasehold

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To be secured by their joint and several bond.

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premises, and the interest thereof, from the same period; and they shall thereupon become partners, and enter into partnership in the said business, upon such terms as they shall think proper.

If the nephew refuses to enter into partnership with [B. B.], then [B. B.] may take to the stock, &c., upon the same terms.

That if the said [B. B.], upon the decease of the said [A. A.], shall be willing, but the said [C. C.] shall refuse to enter into such partnership upon the terms following, (that is to say): the said [B. B.] taking three full and equal fourth parts or shares of the profits and gains, and bearing the like share of the losses, and the said [C. C.] taking the remaining fourth part or share of profits and gains, and bearing the like proportion of losses, and they contributing capital in the like proportions, and being allowed interest thereon; and the said partnership, in other respects save as aforesaid, being carried on and conducted upon, under, and subject to the same terms, conditions, and agreements, as the said partnership hereby entered into, as herein expressed, or as near thereto as the nature and circumstances of the case will permit; and if no other terms of partnership shall be mutually agreed on between the said [B. B.] and [C. C.], or in case the said [A. A.] *shall exclude, or, by his will or [*228] otherwise, give any power to any person to exclude, the said [C. C.] from the said business, and he shall be excluded therefrom accordingly; then, and in either of the cases aforesaid, the said [B. B.] shall and may (if he choose and be desirous so to do), be at liberty to purchase and take the said partnership stock, property, and effects, and the said leasehold premises in which the said business is intended to be carried on, at such valuation, upon his the said [B. B.'s] paying the amount of such value, with interest, at such rate, from such time, by such instalments, and in such manner, and upon and by giving his own bond in like penalty, and in all other respects upon the like terms and in like manner as is hereinbefore provided concerning such purchase by the said [B. B.] jointly with the said [C. C.] as aforesaid, substituting only the said [B. B.] alone for the said [B. B.] and [C. C.].

If [B. B.] declines the partnership, the concerns of the present partnership to be wound up.

That in case the said [B. B.] shall, upon the decease of the said [A. A.], decline or refuse to enter into partnership with the said [C. C.] upon the terms aforesaid, and no other terms of partnership shall be agreed on between them,

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and the said [C. C.] should not be excluded as aforesaid, then, and in such case, the affairs and concerns of the said partnership shall be thereupon wound up, adjusted, and settled, and the debts of the said partnership paid and discharged, and the partnership assets collected and disposed of as near as may be, in like manner as is hereinbefore provided in case of the determination thereof by effluxion of time, substituting only the executors or administrators of the said [A. A.] for him the said [A. A.]; and save and except also that the said [B. B.] shall be at liberty to purchase and take at a valuation to be made by such person and in such manner as is hereinbefore mentioned, in the event of the said [C. C.] retiring or refusing to enter into partnership with the said [B. B.], or being excluded as aforesaid, his the said [B. B.'s] one fourth part of the stock and effects of the said partnership (other than the leasehold premises wherein the said partnership business may be carried on, and the credits thereof and capital in hand), upon and by giving and executing unto the executors or administrators of the *said [A. A.], his bond, in a penalty double the amount of the principal sum to be secured thereby, for the payment of the amount of such value, together with interest thereon, at the rate of five pounds *per cent. per annum*, from the time of the decease of the said [A. A.], in manner following, (that is to say): one equal third part of the amount of such value, with interest thereon as aforesaid, at the expiration of three years after such death of the said [A. A.]; one other third part of the amount of such value, with interest thereon as aforesaid, at the expiration of four years after such death of the said [A. A.]; and the remaining third part of the amount of such value, with interest thereon as aforesaid, at the expiration of five years from the death of the said [A. A.]: and upon such bond having been given and executed by the said [B. B.], he shall and may have and take such one fourth part or share of the said copartnership stock and effects for his own use and benefit; and the same, if required, shall be assigned unto and vested in him absolutely by the executors or administrators of the said [A. A.]; and the said monies so received shall be held and applied as part of the assets of the said partnership; And save and except also, that, in such case as last aforesaid, the said [C. C.] shall (if

And [B. B.] to be at liberty to purchase one fourth share of the stock, &c.

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And [C. C.] may purchase

he choose and be desirous so to do,) upon a valuation having been fixed upon the three fourth parts of the stock and effects of the said partnership, other than credits owing thereto and capital in hand, but together with the entirety of the aforesaid or any other leasehold premises in which the said business may be carried on at the decease of the said [A. A.]; such valuation to be made by proper persons to be chosen as follows, *viz.* one by the executors or administrators of the said [A. A.], one other by the said [B. B.], and the third by the said [C. C.], within seven days after request; and in case either party refuse or neglect to name such referee within such seven days after such request, then the other party or parties shall name such referee for the party or parties so neglecting or refusing; and such three referees, previously to their entering on such reference, shall choose an umpire to determine in case such three referees do not agree; be at liberty to purchase and take such three fourth parts of the said *stock and effects, and the entirety of the said leasehold premises, at such valuation, upon and by giving and executing unto the executors or administrators of the said [A. A.], his bond, in a penalty double the amount of the principal, for the payment to such executors or administrators of the amount of such value, together with interest thereon, at the rate of five pounds *per cent. per annum* from the time of the decease of the said [A. A.], in manner following, (that is to say): one equal third part of the amount of such value, with interest thereon as aforesaid, at the expiration of three years after such death of the said [A. A.]; one other third part thereof, with interest as aforesaid, at the expiration of four years from the death of the said [A. A.]; the remaining one third part thereof, with interest as aforesaid, at the expiration of five years from such death of the said [A. A.]: and upon such bond having been given and executed by the said [C. C.], he shall and may have and take such three fourth parts or shares of the said copartnership stock and effects, and the said leasehold premises, for his own use and benefit; and the same, if required, shall be assigned unto and vested in him absolutely, by the executors or administrators of the said [A. A.] and the said [B. B.]; and in case the said partnership business shall not be carried on in the said leasehold premises in —— aforesaid, at the decease of the said

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the other three fourths.

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[A. A.], and the said [C. C.] purchase and take the said three fourths of the said stock and property on the said premises in which the said business shall be then carried on in manner aforesaid, the executors or administrators of the said [A. A.] shall hold such proportion of the said valuation, to be secured to them as last aforesaid, as shall be fixed by the said referees or umpire, as and for the value of the said premises, (which in such case it is hereby agreed they shall value accordingly separately), in trust for, and to apply the same as part of the assets of the said partnership for the benefit of the said [B. B.] and the estate of the said [A. A.]

Surviving partners to have the use of capital for a limited period; to be accounted for at certain periods, and carry interest.

THAT the party or parties respectively, who shall, under the aforesaid provisions, take or become entitled to the said business, and purchase the stock and property thereof as aforesaid, shall also have and be entitled to the use of *the capital of the said partnership, consisting of cash in hand and outstanding credits due to the said partnership; and if, under the said provisions, the said [C. C.] take three fourths of such business and stock, and the said [B. B.] the other fourth thereof, they shall have the use of the said capital in the like proportions, but, under the provisions aforesaid, all the debts owing by the said partnership shall be paid and discharged as soon as may be, and the party or parties so having the use of the said capital shall account, on the first day of every calendar month (if required by any person or persons interested therein), for and concerning all capital so received; and the amount which shall, on such day, have been received from time to time, (whether accounted for as aforesaid or not), shall thenceforth bear and carry interest at the rate of *5l. per cent. per annum*, which interest shall be applied as part of the assets of the said partnership for the benefit of, and belong to, the party or parties interested therein; and such capital shall be repaid by the like instalments as is hereinbefore provided concerning the valuation of the other property and effects to be taken by such party or parties so having the use of the said capital; and the bond or bonds to be given under the aforesaid provisions for securing such valuations as aforesaid, shall also extend to the securing of the repayment of such capital and interest; save and except, nevertheless, that no instalment

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of any capital not actually received more than three calendar months prior to any instalment becoming due on such bond or bonds aforesaid, nor any interest thereon, shall be or become payable until the next instalment thereof for the time being shall become due and payable on such bond or bonds, such capital, nevertheless, bearing interest from the respective periods appointed for the payment of the same as aforesaid (*i*).

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Arbitration clause.

*THAT if any doubt, question, difference, or dispute shall arise between the said parties hereto, or the survivor of them, and the executors or administrators of either of them, or any other person or persons interested by virtue hereof, touching these presents, or any thing herein contained, or any valuation to be made, or other act or thing to be done in pursuance hereof, which shall not be settled between themselves within twenty-one days after the same shall arise, then every such doubt, question, difference, or dispute shall be referred

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(*i*) It has been already observed (*ante*, p. 30), that a Court of Equity will, in general, consider as expunged from the partnership deed provisions on which the parties have not acted. Perhaps, however, the rule is not universal in its application, except in regard to cases in which the parties have not only omitted to act upon, but have acted in contradiction to such provisions, and which, therefore, could not be applied without injustice. Such was the case in *Jackson* v. *Sedgwick*, 1 Swanst. 470, which has been usually considered as an authority for this doctrine. In order to prevent the temporary neglect of a provision from being construed into an intention totally to abandon it, the following clause may be inserted:—

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Neglect of any particular provision not to be construed as an abandonment of it.

"That in case the said parties hereto shall at any time during the continuance of the said partnership neglect or omit to comply with or to act upon any of the clauses or provisions herein contained, such clause or provision, clauses or provisions, shall not on that account be considered as wholly abandoned or rejected by the said parties, so as to prevent the same from being operative and binding at any future or subsequent period of the said partnership, unless, by reason of the acts and conduct of the said parties or otherwise, such clause or provision, clauses or provisions, shall have become inapplicable to and inconsistent with the relative rights, interests, and duties of the said parties respectively at such periods."

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to the award, arbitration, final end, and determination of indifferent persons, to be chosen by the parties in dispute, one by each of them, within ten days after request by any other party (the executors or administrators of a deceased party being considered as one party); and in case any party shall refuse or neglect to name an arbitrator within such ten days after such request, then the other party or parties in dispute shall name an arbitrator for the party so neglecting or refusing, and the arbitrators to be chosen in either manner aforesaid shall choose an umpire, previously to their proceeding in any such reference, to take upon himself and proceed in any such reference in case such arbitrators do not agree and

[*233] *determine within the original or enlarged time for making their award; and the said parties, their executors and administrators, shall attend such arbitrators or umpire for the time being proceeding in any such reference, and submit to be examined before them or him on oath or otherwise, as and when and where they or he shall appoint; and the award and determination of such arbitrators or umpire shall be binding and conclusive upon the parties in dispute, so as every such award and determination be made by the said arbitrators or umpire in writing, and signed by them or him, ready to be delivered to the parties in dispute within one calendar month after the matters in difference shall be referred to the said arbitrators, or devolve on the said umpire, or within such further or enlarged time or times as the said arbitrators or umpire for the time being proceeding in the reference shall think proper and reasonable, and shall, by writing, appoint; and such submission shall, at the instance of any of the parties in dispute, be made a rule of any of his Majesty's Courts of record in Westminster, pursuant to the statute in that case made and provided, if the Court so think fit. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

DEED *of* PARTNERSHIP *between two* FARMERS, *for the Term of a* LEASE *which had been granted to one;* STOCK, *&c. to be* VALUED; *a Proportion of which, and also a* PREMIUM *to be paid by* INCOMING PARTNER; *on the* DEATH *of one of the Partners, Concern to be* CARRIED *on by the* OTHER, *with the* REPRESENTATIVES *or* TESTAMENTARY NOMINEE *of the* DECEASED PARTNER; ALLOWANCE *to* SURVIVING PARTNER *for trouble of* MANAGEMENT: *if the other Partner* DIES, *the* SURVIVING *Partner may* DETERMINE *Partnership by* NOTICE, OTHERWISE *to carry on the* CONCERN *jointly with the* REPRESENTATIVES, *&c. At the* END *of* TERM, *one Partner to have the Liberty of* PURCHASING *any part of the* STOCK. BETWEEN TWO FARMERS.

THIS INDENTURE, made the —— day of ——, in the year 18—, BETWEEN [A. A.], of &c., farmer, of the one part, [B. B.], of &c., farmer, of the other part. WHEREAS, by an indenture of lease, bearing date on or about the —— day of ——, 18—, and made between [*lessor*] of the one part, and the said [A. A.] of the other part, for the considerations therein expressed, the said [*lessor*] did demise unto the said [A. A.], *All that,* &c., *(describe parcels); To hold* the same unto the said [A. A.], his executors, administrators, and assigns, from the —— day of —— then last, for the term of —— years, under the yearly rent of £——, payable half-yearly, as therein mentioned, and under such further contingent yearly sums, and subject to such covenants and conditions as therein are contained. AND WHEREAS the said [A. A.] is possessed of, or entitled to, a considerable stock upon the said farms, consisting of horses, carts, waggons, cows, oxen, crops upon the lands, implements, and *utensils of husbandry, and other articles and things. AND WHEREAS it hath been agreed between the said [A. A.] and

Parties.

Recital of lease.

That [A. A.] is possessed of stock, &c.

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Of agreement to become partner.

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[B. B.], that the said farms shall from the —— day of —— next ensuing, during the then residue of the said term of —— years granted by the said recited indenture of lease as aforesaid, be managed and cultivated by them the said [A. A.] and [B. B.], for their mutual benefit and advantage; and that they shall be equally entitled to the clear gains and profits to arise from the said farms, subject to the conditions and agreements hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the mutual trust which the said parties respectively mutually repose in each other, each of them the said [A. A.] and [B. B.] doth hereby for himself, his heirs, executors, and administrators, and so far as relates to his own acts and deeds, but not further or otherwise, covenant and agree with the other of them, his executors and administrators, in manner following, (that is to say):

Testatum.

Mutual covenant by the parties,

to cultivate the farms for their joint benefit, during the remainder of the lease.

I. THAT the said [A. A.] and [B. B.], (if they shall be both living on the —— day of —— next ensuing), shall become and be beneficially interested in the said recited lease, and in the gains and profits to arise from the said farms and premises, in equal proportions, from the said —— day of —— next, during all the residue which shall be then unexpired of the said term of —— years, by the said indenture of lease granted as aforesaid, *Subject* to the proviso hereinafter contained for determining the said joint concern, on such notice being given or left by the said [B. B.] as hereinafter mentioned; and that the said farms, lands, and premises, shall, during that period, be managed, cultivated, and superintended by the said [A. A.] and [B. B.], for their mutual benefit and advantage.

Each party to exert himself;

II. THAT, in the cultivation, management, and improvement of the said farms, each of the said parties shall, during the continuance of the said joint concern, use his best and utmost endeavours; and shall not nor will willingly or knowingly make, do, or suffer any act or thing which may amount to, or be considered as a breach of, any of the lessee's covenants contained in the said recited indenture.

Not to do any act which shall prejudice the lease.

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[B. B.] to pay a premium.

*III. THAT the said [B. B.] shall, upon the —— day of —— next, pay unto the said [A. A.] the sum of £——, as or by way of premium or consideration for the admittance

of the said [B. B.] into the said joint concern, and that over and above the sum of money hereinafter stipulated to be advanced by the said [B. B.] as his share of the capital of the said joint concern.

Stock on the farm to be valued.

IV. THAT the stock, both live and dead, of and belonging to the said [A. A.], which shall be upon the said farms and premises on the —— day of —— next ensuing, shall, upon that day, or as soon as may be thereafter, be valued, either by the said parties hereto, or, in case they differ, by two indifferent persons, one of whom shall be chosen by the said [A. A.], and the other by the said [B. B.], within —— calendar months next after the —— day of —— next; and in case such two referees shall also differ, then, by such one person as they the said referees shall for that purpose appoint.

Crops, &c. to form part of the stock.

V. THAT the crops which shall be growing upon the said farm on the —— day of —— next, and also the improvements made by the said [A. A.], upon or in respect of the said farms, lands, and premises since the —— day of —— in the particulars following, (that is to say), in laying down manure upon the said lands, in hedging, ditching, &c. *(particularize other improvements)*, shall be considered as part of the stock to be valued, and shall be included in such valuation as aforesaid.

[B. B.] to pay one half of the valuation.

VI. THAT immediately after such valuation shall be made as aforesaid, the said [B. B.] shall pay to the said [A. A.] so much money as shall be equal in value to one moiety of such stock, according to the valuation to be made thereof as aforesaid; but in case the value of the said moiety shall exceed the sum of £——, then the said [B. B.] shall not be compelled to pay to the said [A. A.] more than the said sum of £——, immediately upon such valuation being made as aforesaid; and in case the said [B. B.] shall not then pay more than the said sum of £——, the remainder of the amount of the value of the said moiety of such stock shall be considered as a debt owing from the said [B. B.] to the said [A. A.], bearing interest from the —— day of —— next after the rate of *five pounds *per cent.*; which interest shall be paid to the said [A. A.] by equal half yearly payments, and shall be a charge upon the share of the said [B. B.] of and in the gains and profits of the said farms and premises; and the principal of the said debt shall be paid by the said

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[B. B.] to the said [A. A.], upon the said [A. A.] giving unto the said [B. B.], or leaving at his place of abode for the time being, six calendar months' notice in writing, requiring the said [B. B.] to pay the said debt, and specifying the day on which it ought or is to be paid; and in case no such notice shall be given or left during the said joint concern, then such debt, and all arrears of interest thereon, shall be paid by the said [B. B.], his executors or administrators, to the said [A. A.], his executors or administrators, as soon as may be after the end or determination of the said joint concern.

Each party to have a several right in his share.

VII. THAT each of the said parties shall have a several right in a moiety of the said stock, and that the same stock shall, from time to time, during the said joint concern, be continued and employed in or upon the said farms and premises, and for the cultivation and improvement thereof, and no part thereof shall be used for any other purpose.

The stock, when valued, to amount to 3,000*l.*

VIII. THAT the stock of or belonging to the said [A. A.] shall, at the time of the valuation thereof, amount in value to the sum of 3,000*l.* at the least.

Profits, how to be divided.

IX. THAT the clear gains and profits of, or to arise from, the said farms and premises, shall be divided between the said parties in equal proportions; nevertheless, during the first year of the said joint concern, neither of the said parties shall draw out or receive from the said clear gains and profits, as his proportion thereof, more than the sum of £——; and if the said clear gains and profits of or to arise from the said farms and premises during the first year of the said joint concern shall exceed the sum of £——, then the surplus thereof shall be added to the said capital stock of or belonging to the said joint concern, and shall be considered as part thereof.

Each party equally to sustain the losses and expenses.

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X. THAT each of the said parties shall contribute towards the payment of the rents reserved upon the lease under which the said farms are holden, and the performance of the covenants therein contained, the payment of *rates and taxes, and also towards keeping up the live and dead stock upon the said farm, and also towards the payment of all expenses and losses which shall be incurred in the management and cultivation of the said farms and premises, in equal proportions.

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[A.A.] to reside in the house.

XI. THAT the said [A. A.] shall reside at, and have the sole use of the said messuage and farm-house called ——, in exclusion of the said [B. B.]; And the said [A. A.] shall pay to the said joint concern the annual sum of £——, by way of rent for the same; for the payment of which said yearly sum of £——, the share of the said [A. A.] in the gains and profits of the said joint concern shall be considered as primarily liable.

Allowance for the board of servants.

XII. THAT the said [A. A.] shall be paid out of the gains and profits of the said joint concern the yearly sum of £—— for each workman, husbandman, and labourer to be employed, with the consent of the said [B. B.], for the purposes of the said joint concern, whom he shall board and lodge in the said messuage and farm-house called ——.

As to the crops before the beginning of the copartnership.

XIII. THAT the crops now being in or upon, and which shall, on or before the —— day of —— next, be got in or produced from the said farms and premises, shall be considered as the sole and exclusive property of the said [A. A.]

Neither party to take apprentices, &c. without the consent of the other.

XIV. THAT neither of the said parties shall, without the consent of the other of them, take or receive any apprentice, or hire, employ, or engage any servant, husbandman, workman, or labourer, in or about the said joint concern.

If either party becomes bound as surety, or does certain other acts, partnership may be dissolved by the other.

XV. THAT in case either of the said parties shall, at any time or times during the said joint concern, enter into any bond, or become bail or surety with or for any person or persons whomsoever, or confess any judgment, or authorize the signing and entering up of the same without the consent of the other of them first obtained in writing, or shall sell or contract to sell, or deliver by way of trust or credit, any of the joint stock, produce, or articles, to the amount of £—— or upwards, of or belonging to the said joint concern, to any person or persons whom the other of the said parties shall have forbidden to be trusted, or shall do or suffer any other act, matter, or thing, by means whereof *the said farms and premises, or any part thereof, or the said joint concern, or the share or interest of either of the said parties, shall be seized, attached, taken in execution, charged, or incumbered: Then and in either of the said cases it shall be lawful for the other of the said parties, if he shall think fit, within three calendar months after the discovery thereof shall be made to him, to

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dissolve and determine the said joint concern by giving notice in writing for that purpose to the offending party within three calendar months; and immediately after such notice shall be given, the said joint concern shall cease and determine; and in that case the like final account shall be made as hereinafter directed to be made at the end of the said copartnership.

Neither party to engage in any other concern.

XVI. THAT neither of the said parties shall, at any time or times, during the continuance of the said joint concern, without the consent of the other of them in writing for that purpose first obtained, be directly or indirectly concerned in, or use, exercise, or follow any trade, business, or concern whatsoever other than and except the said joint concern.

Yearly account.

XVII. *(The usual clause for a yearly account.)*

If both die before the end of the lease, copartnership to determine.

XVIII. THAT in case both of them the said [A. A.] and [B. B.] shall die before the expiration of the said term granted by the hereinbefore recited indenture of lease, then, immediately after the decease of the survivor of them, the said joint concern shall cease.

If [B. B.] dies, living [A. A.], he to carry on the concern jointly with the executors, &c. of [B. B.]

XIX. THAT in case the said [B. B.] shall depart this life before the expiration of the said term, leaving the said [A. A.] him surviving, then and in such case the said [A. A.] shall, during the then residue of the same term, if he shall so long live, carry on the said joint concern jointly with the executors or administrators of the said [B. B.], or such other person or persons as he by his last will and testament in writing, or any writing by him duly executed in the presence of and attested by two or more credible witnesses, shall nominate and appoint in that behalf; who shall thereupon accordingly, from and after the decease of the said [B. B.], be and become jointly concerned with the said [A. A.] in the said farms and premises in the room of the said [B. B.], under and subject to the like terms and

[*240] *agreements as are herein expressed between the said parties hereto in case they were both living, or as near thereto as circumstances will then permit; save only, that, in case the share of the executors or administrators, or other person or persons appointed by the said [B. B.] as aforesaid, of and in the said stock of the said joint concern shall become less than the share of the said [A. A.] therein, then such executors or administrators, or other person or persons as aforesaid, shall only be entitled to receive a share of the gains

and profits of the said joint concern, in proportion to his, her, or their share of the capital thereof as aforesaid, and save only that such executors or administrators, or such other person or persons as aforesaid, shall not personally attend to the management or cultivation of the said farm and premises; and save also that the said [A. A.], in consideration and in recompense of the extraordinary care and trouble which he will have in the management and cultivation of the said farm and premises, with the executors or administrators of the said [B. B.], or with such other person or persons as he shall appoint in that behalf as aforesaid, shall, from and after the decease of the said [B. B.], during the then residue of the said term, if the said [A. A.] shall so long live, receive the yearly sum of £——, by and out of the share of the said [B. B.], his executors, administrators, or appointees, of and in the clear gains and profits of the said farms and premises, and joint concern.

Allowance to [A. A.] for management.

XX. That in case the said [A. A.] shall depart this life during the said term, leaving the said [B. B.] him surviving, then, and in such case, it shall be lawful for the said [B. B.], at any time within six calendar months next after the decease of the said [A. A.], to dissolve and determine the said joint concern, by giving or leaving notice in writing, within that time, to or for the executors or administrators of the said [A. A.], at the said messuage or dwelling-house, called ——, signifying the desire of the said [B. B.] to dissolve and determine the said joint concern; but, if the said [B. B.] shall not give or leave such notice within the time aforesaid, then, and in such case, the said [B. B.] shall, during the then residue of the said term, if he shall so long live, carry on the said joint concern *with the executors or administrators of the said [A. A.], who shall thereupon accordingly, from and after the decease of the said [A. A.], be and become jointly concerned with the said [B. B.] in the said farms and premises in the room of the said [A. A.], under and subject to the like terms, conditions, and agreements as are herein expressed between the said parties hereto in case they were both living, or as near thereto as circumstances will then permit.

If [A. A.] dies, [B. B.] may determine the partnership by notice.

Otherwise to carry on the concern jointly with the executors of [A. A.]

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XXI. Provided always, that in case the said [B. B.] shall survive the said [A. A.], and the said [A. A.] shall die without having or leaving an executor or administrator

If [A. A.] dies not leaving an executor or administrator ca-

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pable of holding the premises, the copartnership to cease.

that shall be capable of holding and occupying the said premises, and every part thereof, or who shall not continue to hold and enjoy the same and every part thereof, pursuant to the terms of the said recited indenture of lease, then, either upon the decease of the said [A. A.] in the life-time of the said [B. B.], without having or leaving an executor or administrator capable of holding or occupying the said demised premises, or upon such executor or administrator not continuing to hold or enjoy the same, as the event may be, the said joint concern shall cease and determine.

Final account.

XXII. THAT at the end of the said term granted by the said recited indenture of lease, or at the sooner determination of the said joint concern in any of the events hereinbefore mentioned, the said parties respectively, or their respective executors or administrators, shall and will, within —— then next following, make, &c. *(Clause for a final account in the usual manner).*

Liberty to [A. A.] at the end of the term to take any part of the stock at valuation.

XXIII. PROVIDED always, that in case the said [A. A.], his executors or administrators, shall, upon the determination of the said joint concern, be desirous of purchasing all or any part of the share of the said [B. B.], his executors or administrators, of and in the said stock and effects belonging to the said joint concern, it shall be lawful for him or them so to do upon giving unto the said [B. B.], his executors or administrators, notice in writing of such his wish or desire within one calendar month next after the determination of the said joint concern; and in case the said parties shall differ as to the value or price to be given for the share of the said [B. B.], his executors or administrators, of and
[*242] in the said stock and effects so to be purchased as *aforesaid; Then the said share shall be valued by two indifferent persons, one of whom shall be chosen by the said [A. A.], his executors or administrators, and the other by the said [B. B.], his executors or administrators; And in case such two persons shall differ in their valuation, then the same shall be valued by such one person as the said two referees shall for that purpose appoint; And the said [A. A.], his executors or administrators, shall thereupon pay unto the said [B. B.], his executors or administrators, such sum of money for the purchase thereof as the said two referees, or their umpire, shall determine to be the value thereof. *(Add usual arbitration clause).* IN WITNESS, &c.

EXTENSION *of the* TERM *of a* PARTNERSHIP *by a* DEED POLL INDORSED *upon the* PARTNERSHIP DEED.

EXTENSION OF PARTNERSHIP TERM.

TO ALL TO WHOM THESE PRESENTS SHALL COME, the within-named [A.], [B.], and [C.] SEND GREETING. WHEREAS the term of seven years mentioned and prescribed in and by the within-written indenture for the continuance of the partnership thereby agreed to be entered into by and between the said parties, doth this day expire; But the said parties, being impressed with the conviction that it would be for their mutual benefit and advantage to extend and prolong the said partnership, have agreed to continue partners in the within-mentioned art, trade, or mystery of manufacturing and making ——, and in doing and performing all other matters and things incident thereto, henceforth for the further period of seven years, upon precisely the same terms and conditions as are within expressed of and concerning the said partnership thereby created (*a*); NOW THESE PRESENTS WITNESS, *that each of them the said [A.], [B.], and [C.] doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the others and other of them, their and his executors and administrators, in manner following, (that is to say): That they the said [A.], [B.], and [C.] will be, remain, and continue partners together in the said art, trade, or mystery of manufacturing and making ——, and in doing and performing all other matters and things incident thereto, for the term of seven years hence next ensuing and fully to be ended, upon such and the same terms, conditions, and agreements, and with, under, and subject to such and the same covenants, provisoes, declarations, and agreements as are within mentioned, expressed, and declared

Agreement to continue copartnership.

[*243] *Testatum.*

Mutual covenants to continue partnership, and perform covenants, &c. as within.

(*a*) If any of the provisions are to be altered, add—

"except in respect of the particulars hereinafter mentioned and referred to."

EXTENSION OF PARTNERSHIP TERM.

of and concerning the within-mentioned copartnership, for the within-mentioned term of seven years, and as the said parties hereto, their respective heirs, executors, and administrators would have been subject or liable unto if the within-written indenture, and the partnership thereby created, and the several covenants, declarations, provisoes, and agreements therein mentioned and contained had been made or entered into for the term of fourteen years instead of the term of seven years (*b*). IN WITNESS, &c.

(*b*) Add, if so intended—

Variation where new terms are added.

"Save and except so far as respects the power of determining the partnership at any time during the continuance thereof, on giving six calendar months' previous notice, within limited and reserved to the said [A.], which power it is expressly intended and agreed by and between the said parties shall no longer exist, but be entirely extinguished."

Or, "Save and except that the said [A.] shall not henceforth be required to devote his whole time and attention to the business of the said partnership, according to the covenant in that behalf contained in the within-written indenture, but only so much of such time and attention as his health and his other employments or avocations will conveniently permit *(or otherwise, as the case may be)*."

SUB-PARTNERSHIP IN RESPECT OF A CERTAIN SHARE.

AGREEMENT *by one* CO-PARTNER *with* TWO *other* PERSONS *to* ADMIT *them to an* EQUAL PARTICIPATION *in the* PROFITS *of his* SHARE, *on their covenanting to* CONTRIBUTE *an* EQUAL PROPORTION *of the Sums* ADVANCED *and to be* ADVANCED *by him as* CAPITAL, *and of all* LOSSES: DECLARATION *of* TRUST *by him accordingly:* COVENANTS *by such* PARTNER *not to exercise a* POWER *of determining the* ORIGINAL PARTNERSHIP *given him by the* ARTICLES, *and also to* PERFORM *such* ARTICLES: *Also, to produce* PARTNERSHIP ACCOUNTS, *and communicate Information to the* SUB-PARTNERS, *so far as he lawfully can, consistently with his* COVENANTS *with his* ORIGINAL PARTNER; COVENANT *by* SUB-PARTNERS *to bear their* PROPORTION *of* LOSSES, *&c., and not personally to interfere:* STYLE *of* FIRM *not to be changed. (Variation where an* ALLOWANCE *is to be made to the* PARTNER *for the Trouble of* MANAGEMENT*).*

Parties.

THIS INDENTURE, &c., BETWEEN [A.], of &c., of the first part; [B.], of &c., of the second part; and [C.], of &c., of the third part: WHEREAS, by indenture, bearing date the —— day of —— last, and made between [Z.], of &c., of the one part; and the said [A.], of the other part: RECITING, that the said [Z.] had, for several years past, carried on the trade or business of a bookseller and publisher, in —— street, in the city of ——, and that the said [Z.] was possessed of a messuage or tenement, with the appurtenances, situate and being in —— street aforesaid, in or upon which the said trade or business had been carried on by him, for a term of —— years, granted thereof by indenture, dated the —— day of ——, and commencing on

Recital of articles of copartnership.

SUB-PARTNERSHIP, IN RESPECT OF A CERTAIN SHARE.

the —— day of ——, under the yearly rent of £——; and that the said [Z.] was possessed of or entitled unto a considerable stock in trade, consisting of the said messuage or tenement, and of divers copyrights, and parts and shares of copyrights, copper-plates, prints, books of prints, books in sheets, and folded books, and other articles and things, subject, as to part of the said stock in trade (consisting of copyrights, parts and shares of copyrights, copper-plates, prints, books of prints, books in sheets, and folded books), to a security executed thereof by the said [Z.], in and by an indenture, dated the —— day of ——, and made between the said [Z.] of the one part, and [S. & T.] of the other part, for the payment of the several sums of money in the said indenture mentioned or referred to (*a*); AND RECITING, that the said [Z.] and [A.] had mutually agreed to become copartners in the said trade or business of a bookseller and publisher, to be carried on by them in or upon the said messuage or tenement and premises, situate and being in —— street aforesaid, during the term of —— years, to commence from the —— day of —— then and now next ensuing, under and subject to the terms, conditions, and agreements, thereinafter expressed; AND RECITING, that, upon the treaty for the said copartnership, it was agreed that each of them the said [Z.] and [A.] should bring into or advance to the said copartnership trade or joint concern, the sum of £——, as his share of the capital for carrying on the same, and that the said messuage or tenement, and premises, and other the stock in trade of or belonging to the said [Z.], should be valued, and the amount of such valuation, (over and above the sums of money for which the said stock in trade, or a part thereof, was made a security as thereinbefore mentioned), should, if equivalent to the said sum of £——, be considered as his share of the said capital, and if less, then as part of his share of the said
[*246] capital; and that, in case the amount of such *valuation, over and above such sums as aforesaid, should be less than the sum of £——, the deficiency should be made good by

(*a*) But a security of this nature would be void against the assignees, in bankruptcy, of the person making it, the apparent ownership being left in him. As to this, *vide ante*, Vol. 6, p. 200.

SUB-PARTNERSHIP, IN RESPECT OF A CERTAIN SHARE.

the said [A.]; and that the said [A.] should be repaid such deficiency by and out of the share of the said [Z.] of and in the said capital or joint stock, and the gains and profits thereof; *It is witnessed*, that in pursuance of the said agreement, and for the considerations therein mentioned, it was thereby mutually agreed and declared between and by the said [Z.] and [A.], and each of them, for himself, his heirs, executors, and administrators, did thereby covenant and agree with the other of them, his executors and administrators, that they the said [Z.] and [A.] would become, be, and remain copartners in the said trade or business of a bookseller and publisher, for the term of —— years, to be computed from the —— day of ——, [if *either* of the said parties should so long live (*b*)], under and subject to the terms and agreements thereinafter expressed; and it is thereby (amongst other conditions and agreements), provided and agreed, that the said [A.] should, within —— next ensuing the date thereof, advance to the said joint concern the sum of £—— as his share of the said capital, and that the said messuage or tenement, and premises in —— street aforesaid, and all other the stock in trade of the said [Z.], should be valued as therein mentioned, and the amount of such valuation (above the sum of money for which the said stock, or a part thereof, should, for the time being, be a security as thereinbefore mentioned,) should be taken as the whole of the said [Z.'s] share of the said capital, in case the same should be equivalent to the sum of £——, but if not, then as part of his share of the said capital, and if the same should be less than the sum of £——, that the said [A.] should advance unto the said joint *trade, so much money as would make good the deficiency, and should continue the same money in the said trade, until he should be repaid the same by the said [Z.], by and out

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(*b*) In this case there was a provision for the surviving partner carrying on the trade jointly with the representatives of the deceased partner; but the words in brackets are obviously inaccurate, as a partnership between *two* persons cannot subsist after the death of "either" of them. The partnership, which is to be formed under the provision in question, between the surviving partner and the representatives of the deceased, constitutes, in fact, a new partnership.

SUB-PARTNERSHIP IN RESPECT OF A CERTAIN SHARE.

of the said [Z.'s] share of the gains and profits of the said trade, as thereinafter mentioned; that all debts which should be due and owing by the said joint concern, and all losses and damages which might happen thereto, and all servants' board and wages, together with all charges for improving, upholding, or repairing the premises, wherein or whereupon the said business should, from time to time, be carried on; and all rent, taxes, duties, and rates, for or in respect of the same premises, and all other necessary expenses, should be borne and paid by and out of the gains and profits of the said joint concern; and that the clear gains, profits, and income, which should arise from the said joint trade, after the payments and deductions therein mentioned, should be divided between the said copartners in equal shares and proportions; And in the said indenture is contained a power, enabling either of the said parties to dissolve the said copartnership, upon giving —— months' notice; and also a power, enabling the surviving partner, in case of the death of either of them, to carry on the said joint trade or concern fo rthe benefit of himself and the executors, administrators, or appointees, of the deceased partner, and divers other clauses, conditions, provisoes, and agreements, relating to or concerning the said copartnership or joint trade.

Recital of agreement between the present parties.

AND WHEREAS the said [A.] hath agreed that the said [C.] and [D.] shall become jointly and equally interested with him in the share and proportion of him the said [A.] of and in the gains and profits of, and all benefit and advantage to be derived from, the said trades or businesses so agreed to be carried on by the said [Z.] and [A.] in copartnership as aforesaid, upon the said [C.] and [D.] agreeing to contribute towards making up the said capital or stock of £——, and of all other sums to be advanced to or brought into the said trade by the said [A.], pursuant to the said recited indenture or articles of copartnership, in the proportions following, (that is to say): Upon the said [B.] agreeing to contribute one third part thereof, and the said [C.] one

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other third part thereof; and also, upon *their agreeing to bear and pay, equally with the said [A.], all losses, damages, and expenses, which he the said [A.] may incur or sustain in or about the carrying on, or otherwise in respect of, the said trade or business. NOW THIS INDENTURE

Testatum.

WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, it is hereby mutually agreed and declared between and by the said [A.], [B.], and [C.], and particularly the said [A.] doth hereby covenant and agree with each of them the said [C.] and [D.], his executors and administrators, that they the said [A.], [B.], and [C.] respectively, and their respective executors and administrators, shall and will from time to time, and at all times during the said copartnership term of —— years, (if the said copartnership shall so long continue) (*c*), stand and be equally entitled to, and interested in the said share or proportion of him the said [A.] of and in the gains and profits, monies, credits, effects, goods, capital, and stock of the said trade or business of a bookseller and publisher, so agreed to be carried on by the said [Z.] and [A.], upon, under, and subject to the terms, conditions, and agreements in the said recited indenture or articles of copartnership contained; and also, under and subject to the several clauses, covenants, and agreements hereinafter mentioned and contained, or referred to; and that he the said [A.], his appointees, executors, or administrators, shall and will accordingly (*d*) henceforth stand possessed of and interested in the said share or proportion of him the said [A.], of and in the said joint trade or concern, and the gains, and profits, monies, credits, capital stock, and effects thereof, as to one equal third part or share of the same, for and for the only benefit of him the said [A.], his appointees, executors, or administrators; And as to one other equal third part or share of the same, *In trust* for and for the only benefit of him the said [B.], his executors, administrators, or *assigns; And as to the other and remaining one-third part [*249] or share of the same *In trust* for and for the only benefit of him the said [C.], his executors, administrators, or assigns. And in consideration of the agreement hereinbefore contained, they the said [B.] and [C.] do hereby for themselves severally, and for their respective heirs, executors, and ad-

SUB-PARTNERSHIP IN RESPECT OF A CERTAIN SHARE.

Mutual covenants, and particularly by [A.], that himself, and [B.] and [C.], shall be equally interested in his share.

And that [A.] shall stand possessed of share in trust accordingly.

Covenant by [B.] and [C.] to pay proportion of sums ad-

(*c*) If [A.] is to have an extra allowance for his trouble of management, say—

"subject as hereinafter mentioned."

(*d*) "subject as hereinafter mentioned."

SUB-PARTNERSHIP IN RESPECT OF A CERTAIN SHARE.

ministrators, but not the one of them for the other of them, or the heirs, executors, or administrators of the other of them, [but each of them for the acts and deeds of himself and his own heirs, executors, and administrators only], covenant and agree with the said [A.], his appointees, executors, and administrators, that each of them the said [B.] and [C.], his heirs, executors, or administrators, shall and will from time to time and at all times hereafter, during the continuance of the said copartnership between the said [Z.] and [A.] and the appointees, executors, or administrators of the deceased partner, upon demand for that purpose made by the said [A.], his appointees, executors, or administrators, advance and pay unto the said [A.], his executors, or administrators, one-third part of all and every sum or sums of money which he the said [A.] hath already, or which he, his appointees, executors, or administrators, shall at any time hereafter during the continuance of the aforesaid copartnership, pay, advance, or lend, or be called upon or required by the said [Z.], his appointees, executors, or administrators, to pay, advance, or lend to the said copartnership trade, or joint concern, in pursuance of, or in conformity to, the said recited articles or indenture of copartnership; *And also* shall and will reimburse and pay unto the said [A.], his appointees, executors, or administrators, the like respective proportions of and in all loss, damages, and expenses, which he the said [A.], his appointees, executors, or administrators shall pay or sustain by reason of the said joint trade between him and the said [Z.] aforesaid, unless such loss, damages, and expenses shall be occasioned by the breach or non-performance by the said [A.], his appointees, executors, or administrators, of all or any of the covenants and agreements contained in the said articles or indenture of copartnership on the part of him or them to be performed. AND *it is hereby agreed and declared* *between and by the said parties hereto, that they the said [B.] and [C.], their executors or administrators, or any of them, shall not in any manner personally interfere or be concerned in the managing, carrying on, superintending, or conducting the said copartnership or joint concern so entered into between the said [Z.] and [A.] as aforesaid, nor shall the names of the said [B.] and [C.] appear or be used in the firm of the said copartnership. But, nevertheless, it is agreed, that the said

vanced or to be advanced by [A.]

And of all losses.

[B.] and [C.] not personally to interfere.

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[A.] not to ex-

[A.], his appointees, executors, or administrators, shall not nor will, under or by virtue of the power for that purpose contained in the said articles or indenture of copartnership, dissolve the said copartnership so entered into between him and the said [Z.] as aforesaid, without the consent in writing of them the said [B.] and [C.] respectively, or their respective executors or administrators for that purpose first obtained. And the said [A.] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [C.] and [D.] respectively, and their respective executors and administrators, That he the said [A.], his appointees, executors, or administrators, shall and will from time to time and at all times during the continuance of the said copartnership so entered into between him and the said [Z.] as aforesaid, well and truly observe and perform all and singular the covenants, conditions, and agreements, in the said recited articles or indenture of copartnership on his and their part and behalf to be observed and performed; And also, that he the said [A.], his appointees, executors, or administrators, shall and will, on the —— day of ——, which will be in the year of our Lord ——, and afterwards, on the said —— day of —— in every year during the continuance of the said partnership between the said [Z.] and [A.], settle and adjust with the said [B.] and [C.] respectively, or their respective executors or administrators, a general account, touching and concerning the proportion or share of him the said [A.], his appointees, executors, or administrators, of and in the gains and profits, goods, monies, credits, capital, or stock, of or belonging to the said joint trade or concern, so agreed to be carried on between the said [Z.] and [A.] as aforesaid, and of the monies which shall have been received or *paid by the said [A.] on account thereof; And that every such account shall from time to time be fairly written and entered in three several books to be kept for that purpose, so that such stated accounts may appear clear and intelligible; at the foot of which said several accounts, the said parties hereto shall severally subscribe their names, signifying their approbation thereof; and each party shall take into his custody and keep one of such books; which said account, so passed and subscribed, shall be conclusive on the said parties respectively, and shall not be called in question, unless some error or errors shall be dis-

SUB-PARTNERSHIP IN RESPECT OF A CERTAIN SHARE.

ercise power of determining partnership.

Covenant by [A.] to perform articles of copartnership between him and [Z.]

Annually to state an account of partnership transactions.

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Accounts to be entered in books and signed.

SUB-PARTNERSHIP IN RESPECT OF A CERTAIN SHARE.

covered therein within three calendar months, to the amount of £——, and certified in writing by the party or parties discovering the same; And that, upon the settlement of every such annual account as aforesaid, the said [A.], his executors or administrators, shall and will pay over, and account for, to the said [B.] and [C.] respectively, and their respective executors or administrators, their said several shares and proportions of and in all and every the sum and sums of money which shall have come to the hands of the said [A.], by virtue or in respect of his said share or proportion in the said trade or concern, to be carried on by him jointly with the said [Z.] as aforesaid (*e*): *And also*, that he the said [A.], his appointees, executors, or administrators, shall and will from time to *time, and at all times, during the continuance of the copartnership entered into between the said [Z.] and [A.], as aforesaid, and until the adjustment and conclusion of a final account between the said [A.], [B.], and [C.], respecting the engagements hereby entered into between them as aforesaid, at the request of the said [B.] and [C.], or either of them, their or either of their executors or administrators, produce and exhibit unto such of them as shall require the same, all such papers, evidences, documents, and writings, and give and communicate all such verbal information relating to, or in anywise conducive to the manifesting or explaining the state and condition of the said trade or joint concern so entered into between the said

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That [A.] shall produce accounts, and give information of the partnership affairs to [B.] and [C.], so far as he can do so without breach of covenant with his partner.

(*e*) If an allowance is to be made to A. for his trouble of management, (which seems reasonable), say—

Variation where [A.] is to receive a compensation for management.

"But it is nevertheless agreed, that, antecedently to the payments to be made to the said [B.] and [C.] respectively, or their respective executors or administrators, by the said [A.] as aforesaid, he shall be at liberty to deduct and retain, for his own use, out of the monies which shall have come to his hands during the preceding year, in respect of the said share and proportion of the said [A.] of and in the said copartnership concern of him and the said [Z.] as aforesaid, (whether as interest of capital or profit), the sum of £——, as a compensation for his care and trouble in the management of the said concern during the preceding year."

[Z.] and [A.] as aforesaid, as he the said [A.], his appointees, executors, or administrators, lawfully may produce or give, without being guilty of a breach of any covenant or agreement entered into by him with the said [Z.] as aforesaid (*f*). In witness, &c.

SUB-PARTNERSHIP IN RESPECT OF A CERTAIN SHARE.

(*f*) Of course B. and C. would have apprized themselves, by an examination of the articles, of the nature of the obligations of this and every other kind entered into by A.

DEED *of* PARTNERSHIP *between* FOUR JEWELLERS, GOLDSMITHS *and* SILVERSMITHS, *containing special Clauses:* BUSINESS *to be* CARRIED *on in* PREMISES *belonging to one of the Partners:* PARTNERSHIP *to pay* ADDITIONAL *Rent for* IMPROVEMENTS; CAPITAL *to be contributed by the Partners, partly in* STOCK, *partly in* MONEY: CAPITAL *to be* REDUCED *at certain Periods: At the* EXPIRATION *of the Partnership,* CERTAIN PARTNERS *to have the* OPTION *of* TAKING *to the* CAPITAL STOCK *at the last* YEARLY VALUATION: *On the* DEATH *of* CERTAIN PARTNERS, *the* SURVIVORS *to take to their* SHARES: *On the* DEATH *of* OTHERS, *the* SURVIVORS *to have the* OPTION *so to do:* PARTNERSHIP *to* CONTINUE *between* SURVIVORS *to the End of the Term:* SURVIVING PARTNERS *to pay for the* SHARE *of deceased* PARTNER *by* ANNUAL INSTALMENTS, *with special Power to the Representatives of the deceased in certain Cases to call for immediate Payment out of the Partnership Assets: If* PARTNERS *having an* OPTION DECLINE *to* PURCHASE, AFFAIRS *to be* WOUND UP, *and the* EFFECTS *of the Partnership (including* GOOD-WILL *of Trade), to be* DISPOSED

BETWEEN FOUR JEWELLERS.

BETWEEN FOUR JEWELLERS.

of: POWER *to any of the Partners to* WITHDRAW *at* CERTAIN PERIODS, *on Notice; their* SHARES *in such case to be paid by* ANNUAL INSTALMENTS, *to be* SECURED *by* BILLS *accepted by the* CONTINUING PARTNERS, *who are also to give a* JOINT *and* SEVERAL BOND *of* INDEMNITY *against the Debts:* PARTNERSHIP *to* SUBSIST *until the* END *of the* TERM *between the* REMAINING PARTNERS: *On any* DIVISION *of the Partnership Effects, Shares to be* SELECTED *by* BALLOT: POWER *to one of the* PARTNERS *to* ADMIT *his Son into the* PARTNERSHIP: *(Various Clauses in regard to Powers of admitting Relatives, bequeathing Shares, &c.)*

Parties.

THIS INDENTURE, &c., BETWEEN [A.], of the first part; [B.], of the second part; [C.], of the third part; and [D.], of the fourth part: WHEREAS the said [A.], [B.], and [C.], carried on the trade or business of a jeweller, goldsmith, and silversmith, in copartnership, under the firm of [A.], [B.], & Co., for some years previously to the —— of —— last, on which day the said copartnership expired: AND WHEREAS the said trade or business hath since been carried on by the said [A.], [B.], [C.], and [D.], and they the said [A.], [B.], [C.], and [D.], have agreed to be and remain copartners in the same trade or business, as from the said —— day of —— * last, for the period and under and subject to the provisoes and agreements hereinafter expressed. NOW THIS INDENTURE WITNESSETH, that, for effectuating the said agreement, and in consideration of the mutual trust and confidence which they have and repose in each other, each of them the said [A.], [B.], [C.], and [D.], for himself, and for his heirs, executors, and administrators, doth covenant, promise, and agree with and to the others, and each and every of the others of them, and their respective executors and administrators, by these presents, in manner following (that is to say):

Recital of a partnership antecedently subsisting between some of the partners.

Of agreement for present partnership.

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Testatum.

Nature of business.

THAT they the said [A.], [B.], [C.], and [D.], shall and will be and remain copartners and joint traders in the trade or business of a jeweller, goldsmith, and silversmith.

BETWEEN FOUR JEWELLERS.

Duration of partnership.

THAT the said copartnership shall commence from the said —— day of —— last, and shall continue for the term of seven years thence next ensuing.

Firm.

THAT the firm and style of the said copartnership, or house of trade, shall be, for the first four years of the said term, [A.], [B.], and [C.], and shall be, for the remaining three years of the said term, [A.], [B.], [C.], and [D.].

Place of business.

THAT the said trade or business of the said copartnership shall be carried on at the house and shop in —— street, aforesaid, belonging to the said [A.], and now used for that purpose; or, in case the said copartners shall agree to remove the said trade or business from the said house and premises in —— street, then, in such other place or places as the said [A.], during his life, shall from time to time select, or, after the decease of the said [A.], as the surviving partners shall mutually agree upon.

Rent to be paid to one of the partners.

THAT the said [A.], his heirs or assigns, shall be allowed the clear yearly sum of £—— sterling, with a proportional sum for any less period than a year, as and for the rent of the said house and premises in —— street, at which rent the same premises shall continue to be occupied for the purpose aforesaid, during the whole of the said term of seven years, until the said copartners shall mutually agree that the said trade or business shall not be carried on at the same house and premises.

Further rent to be paid for improvements.

THAT in case, at any time or times during so long as the said house and premises in —— street aforesaid shall be made use of for the purpose aforesaid, any repairs, *alterations, or improvements, shall be made in or about the same by the said [A.], with the consent of the other partner or partners, or by the heirs or assigns of the said [A.] after his decease, with the consent of the surviving partners or partner, Then, and in every such case, an allowance, after the rate of £—— *per cent. per annum*, upon the amount of the expenses to be incurred in or about any such repairs, alterations, or improvements, shall be made to the said [A.], his heirs, or assigns, during the then residue of the said term of seven years, or so long as the said house and premises shall be used for the purpose aforesaid, in addition to the aforesaid yearly rent of £——, hereinbefore agreed to be

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BETWEEN FOUR JEWELLERS.

allowed for the use of the said house and premises as aforesaid.

Capital, how and by whom to be advanced.

THAT the capital or joint stock of the said copartnership shall consist of the sum of £——, to be made up and brought into the said trade or business in manner following, (that is to say): The said [A.] shall bring in the share of him the said [A.] in the stock, credits, and effects of the said late copartnership, as the same share is valued at the sum of £—— in the balance sheet, signed by the said [A.], [B.], and [C.], on the said —— day of —— last, and entered in the books of the copartnership hereby established, (being fourteen equal thirtieth parts or shares of the said capital or joint stock of £——); The said [B.] shall bring in the share of him the said [B.] in the said stock, credits, and effects of the said late copartnership, as the same share is valued at the sum of £—— in the balance sheet, so signed by the said [A.], [B.], and [C.], as aforesaid, (being ten other equal thirtieth parts or shares of the said capital or joint stock of £——); The said [C.] shall bring in the share of him the said [C.] in the said stock, credits, and effects of the said late copartnership, as the same share is valued at the sum of £—— in the said balance sheet, so signed by the said [A.], [B.], and [C.], as aforesaid, (being four other equal thirtieth parts or shares of the said capital or joint stock of £——); And the said [D.] shall bring in the sum of £—— in money, (being the remaining two equal thirtieth parts or shares of the said capital or joint stock of £——).

Capital to be employed in the trade.

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THAT the said capital or joint stock, and the gains and *profits to arise from the said trade or business of the said copartnership, shall (subject as hereinafter is mentioned) be used and employed in the said trade or business during the continuance of the said copartnership.

Expenses of partnership, how to be paid.

THAT the rent of the said house and premises in —— street, or of any other house or houses, or buildings, wherein the trade or business of the said copartnership shall for the time being be carried on, and all taxes, rates, assessments, parish duties, and impositions, payable, or to become payable, for or in respect of the same respectively, and the wages and maintenance of all clerks, apprentices, or servants, who shall be used or employed in the business of the said copartnership,

and all expenses of housekeeping, and all other necessary and proper charges and expenses which shall be occasioned or incurred in or about the trade or business of the said copartnership, or in anywise relating thereto; And all debts and duties which are or shall be owing for or upon account of the said trade or business, and all losses and damages which shall come or happen in the same, shall be sustained, paid, and borne, by and out of the said capital or joint stock of the said copartnership, and the gains or profits arising from the said trade or business; or in case the same shall become deficient, then, by all of them the said [A.], [B.], [C.], and [D.], out of their respective separate estates, in the shares and proportions following, that is to say, fourteen thirtieth shares thereof by the said [A.], his executors or administrators; ten thirtieth shares thereof by the said [B.], his executors or administrators; four thirtieth shares thereof by the said [C.], his executors or administrators; and the remaining two thirtieth shares thereof by the said [D.], his executors or administrators.

Shares of partners in profits.

THAT the said [A.], [B.], [C.], and [D.], shall be entitled to the clear net gains and profits arising from the trade or business of the said copartnership, according and in proportion to their several and respective shares in the said capital or joint stock, (that is to say), the said [A.] to fourteen thirtieth shares thereof, the said [B.] to ten thirtieth shares thereof, the said [C.] to four thirtieth shares thereof, and the said [D.] to the remaining two thirtieth shares thereof.

Books of account to be kept.

*THAT proper books of accounts shall be kept by the said parties, and true, plain, and perfect entries shall be made therein of all the monies, goods, wares, merchandizes, effects, credits, and other things belonging or relating to the trade or business of the said copartnership, or which shall be received, paid, sold, or contracted for in the course of such trade or business; and of all such other matters and transactions as are usually written and entered into books of account kept by persons engaged in the said trade or business of a jeweller, goldsmith, and silversmith, together with all such circumstances of names, times, and places, as may be necessary or useful for the better manifestation of the state

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and proceedings of the trade or business of the said copartnership.

That the said books of account, together with all bonds, bills, specialties, assurances, notes, letters, and other writings which shall from time to time concern the said copartnership, shall remain and be kept at the shop at —— as aforesaid, or at such other place where the trade or business of the said copartnership shall for the time being be carried on.

Each partner to have access to books, &c.

That each and every of them the said [A.], [B.], [C.], and [D.], shall and may have free access to inspect, examine, cast up, and copy out the said books at his and their own will and pleasure, without any hindrance or denial of or by the others or other of them.

Three of the partners to employ themselves in the business of the partnership.

That the said [B.], [C.], and [D.], shall at all times during the continuance of the said copartnership diligently and faithfully employ themselves in and about the said trade or business, and carry on, manage, and conduct the same for the greatest benefit and advantage of the said copartnership.

The other need not.

That the said [A.] shall be allowed to take an active part in carrying on, managing, and conducting the said trade or business, so far as he from time to time shall think proper so to do. But he shall at all times be at liberty to absent himself entirely from the said trade or business for any term or time whatever, and without being bound to give any notice of his intention in that behalf to the other partners or any of them.

One partner to have the exclusive power of engaging servants, &c.

That the said [A.] shall at all times during the said co-
[*258] *partnership, or during such part thereof as he shall happen to live, have the sole and exclusive power of taking apprentices, and of hiring and discharging all clerks, workmen, servants, or other persons who shall be employed in or about the trade or business of the said copartnership.

Apprentice fees to be deemed profits.

That the premium or premiums which may be received with or for any apprentice or apprentices who may be taken by the said copartners or any of them, shall be considered and applied as part of the gains and profits of the said trade or business.

Partners to be faithful, &c.

That each of them the said [A.], [B.], [C.], and [D.], shall be just and faithful to the others and each other of

them in all buyings, sellings, accounts, reckonings, receipts, payments, dealings, and transactions, in and about the premises; and shall and will on request give, make, and render to the others and each other of them, a just and faithful account of the same when and so often as such account shall be reasonably required.

To give information to each other.

THAT each of them the said [A.], [B.], [C.], and [D.], shall at all times during the continuance of the said copartnership, upon every reasonable request of the others, or any other of them, inform the others and each other of them, of all such letters, accounts, writings, and other things as shall or may come into his hands or knowledge in anywise touching or concerning the trade or business of the said copartnership.

Not to employ monies, unless for the benefit of the partnership.

THAT none of them the said [A.], [B.], [C.], and [D.], shall, without the consent in writing of the others or other of them, employ any monies, goods, or effects, belonging to the said copartnership, or engage the credit thereof in any matter or thing except upon the account and for the use and benefit of the said copartnership.

None of the partners to engage in any trade, except &c.

THAT none of them the said [A.], [B.], [C.], and [D.], shall or will, either by himself or with any other person or persons whomsoever, directly or indirectly engage in any trade, manufacture, or business, except upon the account and for the benefit and advantage of the said copartnership, save that it shall be lawful for the said [A.] and [B.], either jointly or separately, to trade for their or his separate benefit to any foreign market.

Not to trust after notice.

THAT none of them the said [A.], [B.], [C.], and [D.], *shall, at any time during the continuance of the said copartnership, lend any of the monies, or deliver upon credit any of the goods belonging to the said copartnership, to any person or persons whom the others or any other of them shall, before the sending or delivery of such money or goods, have forbidden them or him (by notice in writing) to trust.

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Any partner so trusting to pay the amount.

THAT if any of them the said [A.], [B.], [C.], and [D.], shall lend any money or deliver upon credit any goods of or belonging to the said copartnership, after such notice given as aforesaid, then and in every such case the party so lending or delivering upon credit any such money or goods

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as aforesaid, shall pay to the said copartnership so much ready money as the money or goods which he shall so lend or deliver upon credit as aforesaid shall amount unto or be valued at.

None to buy goods, &c. beyond a certain amount.

THAT none of them the said [A.], [B.], [C.], and [D.], shall buy, order, or engage in any contract for any goods, wares, article or articles whatsoever, exceeding the value of £——, without the consent in writing of the others or other of them first had and obtained; and that if any of them the said [A.], [B.], [C.], and [D.], shall buy, order, or contract for any goods, wares, or other article or articles exceeding the value of £—— without such consent as aforesaid first obtained in that behalf, then and in every such case the others or other of them shall have it in their or his choice or option either to receive and take such goods, wares, or article or articles for and on account of the said copartnership, or to let the same remain and be for the separate use and benefit of the party or parties who shall so buy, order, or contract for the same without the consent of the others or other of them as aforesaid.

Not to enter into any bond, &c.

THAT none of them the said [A.], [B.], [C.], and [D.], shall, without the consent of the others or other of them in writing first obtained, enter into any bond, or become bound as bail, surety, or security with or for any person or persons whomsoever, or subscribe any policy of insurance.

Not to do any act by which the joint stock, &c. shall be attached, &c.

THAT none of them the said [A.], [B.], [C.], and [D.], shall do, or knowingly or willingly suffer to be done, any act, matter, or thing whatsoever, whereby or by means *whereof the capital or stock in trade of the said copartnership, or any part thereof, or his share or interest therein, may be seized, attached, extended, or taken in execution.

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To pay their respective private debts.

THAT each of them the said [A.], [B.], [C.], and [D.], shall and will from time to time duly and punctually pay and discharge the debts now due and owing, or hereafter, during the continuance of the said copartnership, to be due and owing from him to any person or persons whomsoever; and shall and will at all times hereafter save, defend, and keep harmless and indemnified the others and each other of them, their and his heirs, executors, and administrators, and the said capital or joint stock of the said copartnership, and the increase thereof, of and from all their respective private

and separate debts and engagements already contracted or entered into, or hereafter during the continuance of the said copartnership to be contracted or entered into, and of and from all actions, suits, costs, charges, damages, and expenses on account of the same. BETWEEN FOUR JEWELLERS.

THAT, during the continuance of the said copartnership, the said partners shall draw and receive out of the gains and profits of the said trade or business, for their respective separate use and benefit, the several annual sums of money following, (that is to say): The annual sum of £—— shall be drawn out and received by the said [A.]; the annual sum of £—— shall be drawn out and received by the said [B.]; the annual sum of £—— shall be drawn out and received by the said [C.]; and the annual sum of £—— shall be drawn out and received by the said [D.]; such annual sums of money as aforesaid to be respectively taken and received by two equal half yearly payments, on the —— day of —— and the —— day of —— in every year, and the first payment thereof respectively to be made on the —— day of —— now next ensuing (*a*). Annual sums to be drawn out.

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* THAT, on the 29th day of September now next ensuing, and on the 29th day of September which will be in each of General account to be taken at certain periods.

(*a*) As the sums drawn out may possibly exceed the profits of the current year, which cannot be ascertained until the account of that year is taken, it seems proper to provide for such event as follows:—

"And in case the annual sums so to be drawn out by the respective partners as aforesaid, or any of them, shall, at the end of any year, be found to exceed the share or respective shares of such partner or partners of and in the clear gains and profits of the said copartnership for such year, then and in such case such partner or partners shall be considered as a debtor or debtors to the said copartnership for the excess so drawn out by him or them as aforesaid, and the same shall be repaid or refunded by such partner or partners respectively as soon as the amount thereof shall be ascertained." *Or*, (*as the case may be*), "And the same shall be deducted out of the next monies which, by virtue of the stipulations herein contained, shall become payable to such partner or partners." If the annual sums drawn out exceed the profits, the excess to be refunded.

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the years 1822, 1823, 1824, 1825, and 1826, a full and general account and rest in writing shall be made and taken by the said partners of all such goods, wares, articles, and merchandizes as shall have been sold in the trade of the said copartnership, and of all the stock, monies, credits, debts, and other things belonging or owing to the said copartnership, or owing from or by the said copartnership to any person or persons by reason of the said trade or business, and of all such other matters and things as are usually comprehended in annual accounts of the like nature taken by persons engaged in the trade or business of a jeweller, goldsmith, and silversmith, and that a just valuation and appraisement shall be made of all the particulars included in such account, which shall in their nature be susceptible of valuation or appraisement; and the said general account or rest, and valuation and appraisement shall from time to time be written into four books, and be signed and subscribed in every such book by each of them the said [A.], [B.], [C.], and [D.], within three calendar months next after the time appointed for taking the same respectively.

Parties to be concluded by account.

THAT after each such subscription, each of them the said parties shall take one of the said books into his custody, and shall be bound and concluded by every such account respectively, unless some manifest error shall be *found therein, and signified by any of the said parties to the others and other of them, within six calendar months next ensuing the time appointed for taking such account, in which case such error shall be rectified.

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Profits to be divided or allowed to accumulate.

THAT immediately after every such general account or rest, and valuation and appraisement shall have been so made and taken, and signed by the said partners as aforesaid, all the surplus or residue which from time to time shall remain of the net gains and profits of the said trade or business, after such annual sums of money and allowances shall have been so taken or made out of the same as are hereinbefore in that behalf directed, shall be added to and be considered part of the capital or joint stock of the said copartnership, subject, nevertheless, as next hereinbefore is mentioned.

Capital to be reduced at certain periods.

THAT immediately after the general account or rest, and valuation and appraisement hereinbefore appointed to be

made and taken on the 29th day of September, 1823, shall have been made and taken, and signed accordingly, the capital or joint stock then belonging to the said copartnership (including the balance of the gains and profits of the preceding year after such payments or allowances thereout as aforesaid) shall be reduced to the sum of £——; and immediately after the general account or rest, and valuation and appraisement hereinbefore appointed to be made and taken on the 29th day of September, 1825, shall have been made and taken, and signed accordingly, the capital or joint stock then belonging to the said copartnership (including the balance of the gains and profits of the preceding year, after such payments or allowances thereout as aforesaid) shall be reduced to the sum of £——. BETWEEN FOUR JEWELLERS.

THAT in each of the said cases such reduction as aforesaid shall be made by selecting and taking out of the said capital or joint stock one or more debt or debts then due or owing to the said copartnership, which shall be equal in amount to the surplus of the said capital or joint stock, above the sum to which the same is to be so reduced as aforesaid; and the debt or debts so to be selected and taken out shall be entered in a separate book to be kept for that purpose, and shall from time to time, when and as *the same debt or debts shall respectively be received, be [*263] divided between or among the said partners according to their respective shares in the said capital or joint stock, and the gains and profits of the said trade or business. Mode of effecting the reduction.

THAT within —— next after the expiration of the said copartnership, a general account in writing of all the stock in trade, monies, credits, and effects, then belonging to, or remaining or being in the trade or business of the said copartnership, and of all debts and sums of money due or owing from or by the said copartnership, to any person or persons, and a valuation and appraisement of all the particulars included in such account, which in their nature shall be susceptible of valuation or appraisement, shall respectively be made, stated, settled, and taken, and signed and subscribed in such and the same manner as hereinbefore is expressed with respect to the annual account or rest, and valuation or appraisement hereinbefore directed. General account at the expiration of the partnership.

THAT, immediately after finishing such last-mentioned ac- Two of the

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partners to have the option of taking the partnership property.

count, the said [A.] and [B.], or the survivor of them, shall have the choice and option of taking to themselves or himself all the said capital stock, and the increase thereof then belonging to the said copartnership, as the same shall appear by such valuation and appraisement so to be taken as last aforesaid, provided such choice or option be declared by the said [A.] and [B.], or the survivor of them, within the space of —— days next after the expiration of the said copartnership, by some writing under their or his hands or hand, to be delivered to the other partners or partner, or left for them or him at the house or shop where the business of the said copartnership shall, at the expiration thereof, be carried on.

Payment to be made by six annual instalments, to be secured by the bills of exchange of continuing partners.

THAT in case of such choice or option being made by the said [A.] and [B.], or the survivor of them, of taking the said capital stock, and the increase thereof as aforesaid, then the said [A.] and [B.], or the survivor of them, so making such choice or option, shall pay to the other partners or partner their or his respective shares or share of and in the said capital stock and the increase thereof, as the same shall appear by such last-mentioned account or valuation and appraisement, by six equal *annual instalments; the first instalment thereof to be paid at the end of the first year from the day on which the said copartnership shall expire, with interest upon the amount of the said six instalments, after the rate of five *per cent. per annum*, to be computed from the expiration of the said copartnership, and to be payable yearly for the whole principal sum, or such part thereof as from time to time shall remain unpaid: And such instalments of principal and interest shall be secured to each partner entitled thereto respectively, by bills of exchange to be accepted by the said [A.] and [B.], or the survivor of them, so making such choice or option as aforesaid.

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They also to give joint and several bond of indemnity against debts.

THAT at the same time the said [A.] and [B.], or the survivor of them so making such choice or option as aforesaid, shall, at their or his expense, execute and give to each of the other partners, or to the other partner, as the case may be, their or his bond for indemnifying such last-mentioned partners or partner respectively, and their and his respective estates and effects from and against the debts or

duties which shall then be due or owing from or by the said copartnership, and all claims and demands whatsoever for or in respect of the same, such bond to be joint and several if given by both of them the said [A.] and [B.]

If the partners do not declare their option to take to the stock, a division to be made.

THAT if the said [A.] and [B.], or the survivor of them, shall not, within the said space of —— next after the expiration of the said copartnership, make and declare their or his choice or option to take the said capital stock and the increase thereof in manner aforesaid, then and in such case, immediately after the finishing of such last-mentioned account, the said partners shall pay or make provision for the due and speedy payment of their respective parts and shares of the debts owing by them upon their joint account in respect of the said copartnership, and, subject thereto, the said [A.], [B.], [C.], and [D.], shall be entitled to the capital or stock in trade of the said copartnership, and the increase thereof, in proportion to their aforesaid respective shares or interests therein, and the same shall be divided among them accordingly.

Allowance in lieu of profits to the executors or administrators of deceased partners dying before twenty-ninth of September next.

THAT if any of them the said [A.], [B.], [C.], and [D.], *shall die before the twenty-ninth day of September now next ensuing, then, and in every such case, the executors or administrators of the partner so dying shall be entitled to the share of such partner of and in the said capital or joint stock of £ ——, or the amount or value thereof, and shall also be entitled to an allowance at the rate of *5l. per cent. per annum* on the same share, computed from the commencement of the said copartnership, up to the quarter day immediately preceding such decease, for which purpose the twenty-fifth day of December, the twenty-fifth day of March, and the twenty-fourth day of June, shall be considered the quarterly days, and such allowance shall be accepted by the executors or administrators of the partner so dying, in lieu and in full for the share of such partner of and in the gains and profits of the said trade or business, from the commencement of the said copartnership up to the time of his decease.

Share of partner dying after 29th of September to be fixed by the last annual account.

THAT if any of them the said [A.], [B.], [C.], and [D.], shall die after the twenty-ninth day of September now next ensuing, and before the expiration or determination of the said copartnership, Then, and in every such case, the execu-

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tors or administrators of the partners so dying as last aforesaid, shall be entitled to the share of such partner of and in the capital or stock in trade of the said copartnership, and the increase thereof, or the amount or value thereof respectively, as the same shall appear by the general account or rest, and valuation or appraisement hereinbefore appointed to be taken on the twenty-ninth day of September next preceding such death, (including the balance of the gains and profits of the preceding year, after such payments or allowances thereout as aforesaid); and in case such death shall not happen within a quarter of a year after any such twenty-ninth day of September, then they shall also be entitled to an allowance from the twenty-ninth day of September immediately preceding such death, up to the quarter day immediately preceding such death, according to the average of, or in proportion to, the share of the partner so dying, of the actual profits which by such last-mentioned general account or rest, and valuation or appraisement, shall appear to have been made in the year preceding such last-mentioned twenty-
[*266] ninth day of * September; and such allowance as last aforesaid to be accepted by the executors or administrators of the partner so dying, in lieu and in full for the share of such partner of and in the profits of the said trade or business from the twenty-ninth day of September next preceding such death, up to the time of such death.

If the dying partner shall be [C.] or [D.], the surviving partners to take to their shares.

THAT if the partners or partner so dying as aforesaid, either before or after the said twenty-ninth day of September now next ensuing, shall be the said [C.] and [D.], or either of them, then and in such case, or in each of such cases, the amount or value of the original share of the partner so dying of and in the said capital stock, or in case such death shall happen at any time after the said twenty-ninth day of September, 1823, then the amount or value of so much of such his original share of and in the said capital stock as shall not have been withdrawn pursuant to the provisions hereinbefore contained for reducing the said capital stock or either of them, shall be paid to the executors or administrators of the partner so dying, by the surviving partners or partner, at the expiration of twelve calendar months from the day of the decease of the partner so dying, with interest after the rate of *5l. per cent. per annum*, computed from the day of his de-

cease; and the amount or value of the share of the partner so dying, of and in all the increase, if any, which by the last preceding general account or rest, and valuation or appraisement, shall appear to have been made of the said capital stock, (including the balance of the gains and profits of the preceding year, after such payments or allowances thereout as aforesaid); or in case such partner shall so die after the said twenty-ninth day of September, 1823, then of and in such part, if any, of such increase as shall not have been withdrawn pursuant to the provisions hereinbefore made for reducing the said capital stock, or either of them, together with such allowance as aforesaid in lieu of the profits of the current year as aforesaid; or in case such death shall happen before the said twenty-ninth day of September now next ensuing, then such allowance in lieu of profits as aforesaid, alone, shall be paid by the surviving partners or partner to the executors or administrators of the partner so dying, by six equal yearly instalments, the first instalment thereof to be *paid at the end o one year from the death of such partner, with interest upon the whole amount of such six instalments, after the rate of *5l. per cent. per annum*, to be computed from the death of such partner, and to be payable yearly for the said principal money, or such part thereof as from time to time shall remain unpaid; such several instalments of principal and interest to be secured by bills of exchange to be accepted by the surviving partners or partner in favour of the executors or administrators of the partner so dying.

To be paid by six annual instalments.

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And secured by bills of exchange.

THAT if the partner or partners so dying as aforesaid, either before or after the said twenty-ninth day of September now next ensuing, shall be the said [A.] and [B.], or either of them, then and in such case, or in each of such cases, the surviving partners or partner shall have the choice and option of taking to themselves and himself, all the capital stock then belonging to the said copartnership, provided such choice and option be declared by the said surviving partners or partner within the space of —— next after the decease of the partner so dying, by some writing under their or his hands or hand, to be delivered to the executors or administrators of the partner so dying, or left for them or him at the house or shop where the business of the said copartnership shall for the time being be carried on.

If the dying partner be [A.] or [B.], the surviving partners to have the option of taking to his share.

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THAT in case of such choice or option being made by the said surviving partners or partner, of taking the capital stock of the said copartnership as aforesaid, the said surviving partners or partner shall pay to the executors or administrators of the partner so dying, the amount or value of the said share of such partner, of and in the said capital stock of £——; or in case such death shall happen after the twenty-ninth day of September now next ensuing, then the amount or value of the share of the partner so dying, of and in the said capital stock, and the increase thereof, as the same shall appear by the then last yearly general account or rest, and valuation and appraisement (including the balance of the gains and profits of the preceding year, after such payments or allowances thereout as aforesaid), together with, in each of the said cases, such allowance as aforesaid, in lieu of the profits of the then *current year, by six equal annual instalments; the first instalment thereof to be paid at the end of one year from the death of the partner so dying, with interest after the rate of five pounds *per cent. per annum*, for the whole amount of such six instalments, to be computed from the time of such death, and to be payable yearly, for the amount of the principal money, or such part thereof as from time to time shall remain unpaid; and such last-mentioned instalments of principal and interest shall be respectively secured by bills of exchange, to be accepted by the surviving partners or partner in favour of the executors or administrators of the partner so dying.

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To be paid for by six annual instalments.

Surviving partners to give bond of indemnity.

THAT in each and every of the several cases of death hereinbefore provided for, the surviving partners or partner shall, at their or his expense, execute and give to the executors or administrators of the partner so dying, their or his bond, for indemnifying the estate and effects of such deceased partner from and against the debts or duties which shall then be due or owing from or by the said copartnership, and all claims and demands whatsoever, for or on account of the same, such bond to be joint and several if there shall be more than one such surviving partner (*b*).

Interest of sur-

THAT in every such case the surviving partners or partner

(*b*) As to the necessity for this, *vide ante*, p. 182; also Vol. 3, p. 186.

shall be entitled to the share of the partner so dying, of and in the said capital stock, and the increase thereof, or such part thereof respectively, as shall not have been withdrawn pursuant to the provisions hereinbefore contained for reducing the said capital, or either of them, and of and in the gains and profits of the said trade or business; and the same shall be divided between or among such surviving partners, if more than one, in proportion to their respective shares of and in the residue of the said capital stock, and of the gains and profits of the said business; and such last-mentioned partners shall continue to carry on the said trade or business in copartnership, during all the then residue of the said term of seven years, upon such and the same terms, and under such and the *same conditions and agreements as are hereinbefore or hereinafter contained, or as near thereto as the case will admit.

Surviving partners to take deceased partner's share.

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That in every such case the monies to be secured by bills of exchange, to be accepted by the surviving partners as aforesaid, shall, as between such surviving partners and their respective representatives, be paid out of the said capital stock of the said copartnership, or in case the same shall be deficient, then by the surviving partners, in proportion to their respective shares in the said capital stock.

Bills of exchange to be given for deceased partner's share, to be paid out of joint stock.

That if the partners or partner so dying as aforesaid shall be the said [A.] and [B.], or either of them, and the surviving partners or partner shall not, within the space of —— next after the death of the partner so dying, make and declare their or his choice or option to take the capital stock of the said copartnership in manner aforesaid, then and in such case, immediately after the expiration of the said space of —— next after the decease of the partner so dying, the said copartnership shall absolutely determine, and thereupon a general account in writing of all the stock in trade, monies, credits, and effects, then belonging to, or remaining or being in the trade or business of the said copartnership, and of all debts and sums of money due or owing from or by the said copartnership, to any person or persons, and a valuation and appraisement of all the particulars included in such account, which in their nature shall be susceptible of valuation or appraisement, shall respectively be made, stated, settled, and taken, and signed

If surviving partners do not declare their option to take the share of the deceased partner, the partnership to cease.

And partnership effects to be valued and divided.

BETWEEN FOUR JEWELLERS.

and subscribed, in such and the same manner as hereinbefore is expressed with respect to the annual account or rest, and valuation or appraisement hereinbefore directed; and immediately after the finishing of such last-mentioned account, the surviving partners or partner, and the executors or administrators of the deceased partner, shall pay or make provision for the due and speedy payment of their respective parts and shares of the debts and duties owing by them upon their joint account in respect of the said copartnership; and subject thereto, the said surviving partners or partner, and the executors or administrators of the deceased partner,

[*270] *shall be entitled to the capital or stock in trade of the said copartnership, and the increase thereof, as the same shall appear by such last-mentioned account, in proportion to their aforesaid respective shares or interests in the said capital of £——, and the same shall be divided among them accordingly.

Good-will of trade to be disposed of.

That in such last-mentioned case of the determination of the said copartnership, the good-will of the said trade or business shall be sold and disposed of for such sum or sums of money as can be had or gotten for the same; and in order thereto, the surviving partners, or any of them, shall not at any time after such sale, directly or indirectly engage in the said trade or business of a jeweller, goldsmith, and silversmith, or in any trade or business connected therewith; and shall, upon such sale, enter into or execute any covenant or bond in that behalf, which, by the purchaser or purchasers of the said good-will may be required (*c*); and the sum or sums of money to arise from such sale shall be divided between or among the surviving partners and the executors or

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(*c*) It seems proper to add—

"in which covenant or bond, such partner or partners shall, if required, bind himself or themselves, his or their heirs, executors, or administrators, to pay to the purchaser or purchasers, his or their executors or administrators, a sum double the amount of the purchase-money of the good-will of the said trade as and for liquidated damages, in case of his or their engaging in the said trade or business, contrary to the agreement aforesaid."

administrators of the deceased partner, according to their respective shares in the said capital or joint stock.

THAT in any case hereinbefore provided for, where the trade or business of the said copartnership shall be continued by the surviving partners or partner, after the death of any partner so dying as aforesaid, if such surviving partners or partner, or any of them, shall, after the decease of the partner so dying as aforesaid, admit any new partner or partners, or withdraw himself or themselves from the said copartnership, so as to make any *alteration whatsoever in the firm of the said copartnership for the time being; and, whether such alteration shall be made in the said firm or not, if default shall happen in payment of any of the instalments of principal and interest hereinbefore agreed to be secured to the executors or administrators of the partner so dying, or any part thereof respectively; then, and in either of the said cases, and from thenceforth, the executors or administrators of the partner so dying shall have full power and authority to inspect and take copies of all the books of account and other papers, documents, and writings relating to the concerns of the said copartnership, at all seasonable times, on giving in each case seven days' notice in writing to the persons or person for the time being carrying on the said trade or business, of their or his intention in that behalf: And if they or he, upon any such inspection, shall be of opinion that, from the state of the trade or business of the said firm, or from any diminution of the capital of the said firm, or on account of any proceeding or proceedings to be done or suffered by the said firm, or any partner or partners therein, or any other circumstance whatsoever relating to the premises, their or his security for the money which shall have been secured to them or him by the surviving partners or partner, pursuant to the provision hereinbefore in that behalf contained, or any part thereof, shall be in any respect deteriorated or rendered unsafe, or that the persons or person liable to pay the same, or any of them, shall have become of less responsibility or less worthy of credit, Then, and in such case, a reference shall be made to three indifferent persons, one to be chosen within the time, and in the manner, and under such and the same provisions in all respects as are specified in the general clause of arbitration hereinafter contained; which three persons,

In case of an alteration in the firm, or default being made in payment of any of the instalments, the executors or administrators of a deceased partner to be at liberty to inspect books.

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And if the executors or administrators shall deem the security to be deteriorated, reference to be made to third persons.

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or any of them, shall have full power to inspect and examine all the books of account and papers of or belonging to the said firm; and if the said three persons, or any two of them, shall by their award agree in opinion with the executors or administrators of the deceased partner, with respect to the matters aforesaid, Then, and in such case, and immediately thereupon, all the stock in trade and effects of the said firm, together with the good-will of the said trade or business, *shall be sold and disposed of, collected and got in; and out of the money arising therefrom, all and every the sum and sums of money then owing from the surviving partner or partners to the executors or administrators of any deceased partner or partners as aforesaid, (including as well the annual instalment or instalments, if any, the time of the payment of which shall not have then arrived, as the instalment or instalments then actually due), shall be forthwith paid and satisfied; and a final application and distribution of the said partnership assets and effects shall be made according to the due course of law and the respective rights and interests of the said several partners: But nothing in this present clause contained is in anywise to prejudice or affect the security which shall have been given by the surviving partners or partner to the executors or administrators of the deceased partner, for any such principal monies and interest as aforesaid, or any part thereof respectively.

And if the referees agree with the executors or administrators, effects to be disposed of.

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THAT if any one or more of them the said [A.], [B.], [C.], and [D.], shall be desirous of withdrawing himself or themselves from the said copartnership, either on the 29th day of September, 1823, or on the 29th day of September, 1825, and shall give twelve calendar months' previous notice in writing of such his or their desire unto the other copartners or copartner for the time being, or leave such notice at the place where the said trade or business shall for the time being be carried on, Then, and in every such case, the said copartnership (so far as regards such partner or partners who shall be desirous of withdrawing as aforesaid) shall cease and determine at the time so to be appointed in such notice (*d*).

Any of the partners to be at liberty to withdraw at stated periods.

(*d*) In a partnership deed containing numerous provisions too special to be of general utility, the following power was given to one of the part-

That if any or either of them the said [A.], [B.], [C.], and [D.], shall retire from the said copartnership at either

And thereupon his share to be paid him by annual instalments.

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ners to retire at a certain period of the partnership, the term of which was fourteen years, on receiving a premium calculated on the average profits of his share: but if he continued a partner until the end of the term, he was to retire from the trade without receiving any premium.

"That if the said [A.] shall be desirous to quit the said trade or joint concern at the end of the first seven years of the aforesaid term of fourteen years, and to relinquish the same to and in favour of the said [C.] and [D.], or the survivor of them in case either of them shall be then dead, and of such his the said [A.'s] desire shall give or leave notice in writing six calendar months at least before the expiration of the said first seven years, to or for the said [B.] and [C.], or the survivor of them, at the counting-house for the time being of or belonging to the said joint trade or concern; then, and in that case, the said copartnership and joint trade shall, immediately from and after the expiration of the said first seven years, cease and determine as to the said [A.]; And thenceforth the said trade or business shall be carried on for the then residue of the said term of fourteen years by them the said [B.] and [C.], upon their joint account, and for their mutual advantage, in case they shall be both then living; but in case either of them shall be then dead, the said trade shall thenceforth be carried on by the survivor of them upon his own account: And in either of the cases aforesaid, the said [B.] and [C.], or the survivor of them, as the case may be, shall within —— from the expiration of the said first seven years, pay unto the said [A.], as a premium for his relinquishing the said copartnership trade or joint concern, so much money as the share or proportion of the said [A.] of and in the clear gains and profits of the said joint concern for two years shall amount to, to be computed upon the average amount of the share or proportion of the said [A.] of and in the said gains and profits during the first seven years of the said copartnership term; And in that case also, the share or proportion of the said [A.] of and in the said joint stock and capital of the said joint concern, at the end of the first seven

Power to one of the partners to retire at the end of the first seven years at a premium.

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of the times hereinbefore mentioned, in pursuance of the power hereinbefore in that behalf contained, Then, and in

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years shall be taken and purchased by them the said [B.] and [C.], or the survivor of them, such share or proportion to be valued at the prime cost of such joint stock and capital, and to be paid for as follows:—*(describe mode of payment.)*

At the end of the term, such partner to retire from the trade without a premium.

"THAT in case the said copartnership shall be carried on to the end of the said term of fourteen years, by the said [A.], jointly with the said [B.] and [C.], or the survivor of them, under the provisions in that behalf hereinbefore contained; then, and in such case, the said copartnership trade or joint concern, at the end of the said term of fourteen years, shall be relinquished and given up by the said [A.] to the said [C.] and [D.], or such one of them as shall be then living, without receiving any premium for the same; but the share or proportion of the said [A.] of and in the said stock and capital of the said joint concern, at the end of the said term of fourteen years, shall be taken or purchased by them the said [B.] and [C.], or the survivor of them, upon the same terms, and be paid for in the same manner as is hereinbefore provided, in the event of the said [A.] withdrawing from the said copartnership at the end of the first seven years thereof as aforesaid.

Partner retiring not to exercise the trade.

"THAT in case the said trade or business shall, at the end of the first seven years, or at the end of the said term of fourteen years, be relinquished bythe said [A.] in favour of the said [B.] and [C.], or the survivor of them, he the said [A.] shall not, at any time afterwards, whilst the said trade or business shall be carried on by the said [B.] and [C.], or the survivor of them, exercise or carry on the said trade or business of a ——, in London or Westminster, or within —— miles of either of those places; And that, if the said [A.] shall exercise or carry on the trade or business of a ——, contrary to the covenant hereinbefore contained, then and in such case he the said [A.], his heirs, executors, or administrators, shall pay to the said [B.] and [C.], or the survivor of them, their or his executors or administrators, the annual sum of £——, for so long time as he shall exer-

If he does, to pay a certain annual sum by way of liquidated damages.

such case, or in each of such cases, the amount or value of the share or shares of the said [A.] and [B.], or either of them so retiring as aforesaid, of and in the said capital stock, and of and in the increase, if any, which, by the general account or rest, and valuation and appraisement hereinbefore appointed to be taken, on the day upon which such partner shall so retire, shall appear to have been made of the said capital stock, (including the balance of the gains and profits of the preceding year, after such payments or allowances thereout as aforesaid); or in case they or he shall so retire on the 29th day of September, 1825, then, of and in such part of such capital stock, and the increase thereof, as shall not have been withdrawn pursuant to the provisions hereinbefore made for reducing the said capital or joint stock to the sum of £——, on the 29th day of September, 1823, as aforesaid, shall be paid by the continuing partners or partner, to the partner or partners who shall so retire, by six equal yearly instalments; the first instalment thereof to be paid at the end of one year from the day on which such partner or partners respectively shall so retire, with interest, after the rate of five pounds *per cent. per annum*, to be computed from the day on which such partner or partners shall so retire, and to be payable for the whole of such principal money, or such part thereof as from time to time shall remain unpaid.

To be secured by the bills of exchange of the continuing partners.

That the several principal sums of money hereinbefore agreed to be paid to the said partners, or any or either of them, so respectively retiring as aforesaid, and the interest thereof respectively, shall from time to time, as soon as the

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cise or carry on the said trade or business as aforesaid; such annual sum to be payable as or in the nature of liquidated damages, by equal monthly instalments; And the said [A.] shall and will enter into any further covenant or bond with or to the said [B.] and [C.], or the survivor of them, their or his executors or administrators, for securing the said annual sum that shall or may be required by the said [B.] and [C.], or the survivor of them; such bond or covenant to be prepared at the expense of the person requiring the same."

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amount thereof can be ascertained, be secured by bills of exchange to be accepted by the continuing partners or partner, in favour of the partner or partners so retiring.

They also to give bond of indemnity.

THAT in every case when any of the said partners shall retire from the said copartnership, in pursuance of the power hereinbefore in that behalf contained, the *continuing partners or partner shall, at their or his expense, execute and give to the partner or partners so retiring, their or his bond for indemnifying such partner or partners so retiring, and his or their estates and effects, from and against the debts or duties which shall then be due or owing from or by the said copartnership, and all claims and demands whatsoever for or in respect of the same, such bond to be joint and several, if there shall be more than one such continuing partner.

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Continuing partners to be entitled to share of retiring partner, according to their shares, and to continue in partnership for the residue of term.

THAT in every such case the continuing partners or partner shall be entitled to the share or shares of the partner or partners so retiring, of and in the said capital stock, and the increase thereof, or such part thereof respectively as shall not have been withdrawn pursuant to the provision hereinbefore contained for reducing the said capital to the sum of £—— as aforesaid, and of and in the gains and profits to arise from the said trade or business after such partner shall so retire; and the same shall be divided between or among such continuing partners, if more than one, in proportion to their respective shares of and in the residue of the said capital or joint stock, and of and in the gains and profits of the said business; and such last-mentioned partners shall continue to carry on the said trade or business in copartnership, during all the then residue of the said term of seven years, upon such and the same terms, and under such and the same conditions and agreements as are herein contained, or as near thereto as the case will admit.

Purchase-money of share to be paid out of joint stock.

THAT in every such case the monies to be secured by the bills of exchange to be accepted by the continuing partners as aforesaid, shall, as between such continuing partners, and their respective representatives, be paid out of the said capital stock of the said copartnership, or in case the same shall be deficient, then by the said continuing partners, in proportion to their respective shares in the said capital stock.

In case of a final

THAT upon the expiration of the said copartnership, and

in every other case hereinbefore provided for, where a final division or distribution shall be made of the capital or stock in trade, credits, and effects of the said copartnership, such division or distribution shall be effected *in the manner following, (that is to say): All the stock in trade, credits, and effects of the said co-partnership, shall be divided into thirty lots, by persons to be chosen for that purpose by the several parties entitled to a share upon such division or distribution, one of the said persons to be chosen by each of such parties; the said thirty lots to be of equal value, according to the judgment of the persons making such allotments; and the said thirty lots shall be numbered, and the numbers thereof respectively inscribed or written upon ballots, or separate pieces of card or paper, and placed in a bag or box, and the same ballots, or pieces of card or paper, shall then be drawn or taken out indiscriminately by the said partners, according to the number of thirtieth parts or shares to which they shall respectively be entitled in the said capital or joint stock; and each party, upon such division or distribution as aforesaid, shall be entitled to the lots which shall be so numbered or described on the ballots, or pieces of card or paper, drawn or taken out by him or them respectively, as aforesaid.

division, partnership property to be divided into lots.

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Lots to be selected by ballot.

That it shall be lawful for the said [B.], at any time during the continuance of the said copartnership, to admit and take into the said copartnership, [X. Y.], the son of the said [B.], and thereupon to assign and make over to him the said [X. Y.], any part or parts of the share of him the said [B.], of and in the capital stock of the said copartnership, and the gains and profits of the said trade or business, or of the share of the said [B.] therein; and then, and in such case, the said [X. Y.] shall be, and remain during all the residue which shall be then to come of the said term of seven years, a copartner in the said trade or business, upon such and the same terms, and under and subject to such and the same conditions, covenants, and agreements, as are hereinbefore contained with respect to the said [B.], or as near thereto as the case will admit: *Provided always*, that the said [X. Y.] do and shall, at the time he shall so be admitted a partner, by some deed or instrument in writing, under his hand and seal, covenant and agree with the other partners, and each of them, well and truly to observe and perform all and singular

Power to one of the partners to admit his son into the partnership.

He entering into a covenant to perform these articles.

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the conditions, covenants, and agreements in this present indenture contained, which are or *ought, according to the true intent and meaning of these presents, to be observed and performed by the said [X. Y.] (*e*).

(*e*) The following provisions were inserted in a partnership deed, authorizing the respective partners to dispose of their shares, under certain qualifications in favour of relatives, or others:—

[A. B.] may admit his sons [B.] and [C.] to be partners.

For a share not exceeding two-thirds of his share.

"That it shall be lawful for the said [A. B.], at any time or times while engaged in the said copartnership, to admit either or both of his sons, [B. B.] and [C. B.], as an acting partner or partners in respect of any part or parts, not exceeding in the whole two-thirds of the share of him the said [A. B.] in the net gains and profits of the copartnership, and to assign, or otherwise make over to the son or sons who shall be admitted an acting partner or partners as aforesaid, any part or parts not exceeding two-thirds of the share of the said [A. B.], of the stocks, monies, and effects of the said copartnership; *Provided nevertheless*, that the said [C. B.], the younger son of the said [A. B.]†, shall not be admitted a partner until he attain the age of twenty-one years.

[C.] not to be admitted during his minority.

[A. B.] may bequeath his share.

THAT it shall be lawful for the said [A. B.], by his will or any codicil thereto, to bequeath to or in trust for any person or persons whomsoever, the whole or any part or parts of the share of him the said [A. B.] in the stock, monies, and effects of the said copartnership, and the net gains and profits thereof.

[A. B.'s] executors or the legatee of his share,

THAT if the said [A. B.] shall die while engaged in the said copartnership, and the executors, or administrators of the said [A. B.], and the person or persons, to whom, either as legatee or legatees in his, her, or their own right, or respective rights, or as a trustee or trustees for others, he the said [A. B.] shall make such bequest as aforesaid, shall be of the full age of twenty-one years, and shall within two calendar months after such death give notice in writing to the said [Y. Z.], of his, her, or their intention to become a partner or partners in respect of such share, or the part or parts thereof to which he, she, or they shall be entitled, then, and in such case, the

on giving two months' notice,

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† The other son [B. B.] had attained his majority.

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THAT if any doubt, question, difference, or dispute shall at any time or times hereafter arise or happen between or

Arbitration clause.

executors or administrators, or other the person or persons so giving such notice, shall, from the time of the death of the said [A. B.], be considered a dormant partner or partners in respect of such share or part or parts aforesaid; *Provided nevertheless*, that if the person or persons, so giving such notice as aforesaid, shall be either or both of them the said [B. B.] and [C. B.], and shall be a legatee or legatees in his or their own right or respective rights, then, and in such case, he or they shall be immediately accounted an acting partner or partners in respect of the share or shares, or part or parts of a share, which shall be bequeathed to him or them as aforesaid; *Provided further nevertheless*, that if the said [C. B.] shall be a legatee in his own right, and shall, at the time of the death of the said [A. B].., be under the age of twenty-one years, and, notwithstanding his being under that age, shall, within two calendar months after such death, give notice in writing to the said [Y. Z.,] of his intention to become a partner in respect of the share or part bequeathed to him, then, and in such case, he shall, immediately on his attaining the said age of twenty-one years, be admitted an acting partner in respect of such part or share; and during his minority the whole of the said business shall be carried on solely by the said [Y. Z.]; and he shall be accountable to the said [C. B.], his executors or administrators, upon his attaining his majority, or his death, whichever shall first happen, for the gains or profits which, during such minority, shall have arisen from the part or share so bequeathed to him the said [C. B.] as aforesaid.

shall, from the time of [A. B's] death be considered a dormant partner.

But if a legatee in his own right, then an acting partner.

If [C.] shall be a legatee of the deceased's share in his own right.

Then (if a minor) he shall be admitted on attaining twenty-one.

And during such his minority [Y. Z.] (the surviving partner) shall carry on the business for his benefit and account accordingly.

"THAT the said [Y. Z.], his executors or administrators, shall not be obliged to see that the person or persons, to whom any bequest shall be made by the said [A. B.] of his said share, or any part or parts thereof, in trust as aforesaid, or the executors, administrators, or the assigns of such person or persons, or any of them, applies or apply, according to the trusts expressed concerning the same in the said will or codicil of the said [A. B.], any of the said copartnership monies, which shall be subject to such bequest; and shall

[Y. Z.] (in case of such bequest) shall be discharged from seeing to the due execution of the trusts or application of the profits under the will.

BETWEEN FOUR JEWELLERS.

amongst all or any of the said partners, or between any of them and the executors, administrators, or assigns of any

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not be answerable or accountable to the person or persons beneficially entitled to such monies, for the misapplication or non-application of the monies, or any part thereof, by the person or persons who shall for the time being be the trustee or trustees thereof; and the receipt or receipts of the said trustee or trustees for the time being, shall be sufficient discharges for the said monies, or any part thereof.

Power to [Y. Z.] to admit his brother [A. Z.] an acting partner for the whole or any part of his share.

"THAT it shall be lawful for the said [Y. Z.], while engaged in the said copartnership, and after his said brother [A. Z.] shall have attained the age of twenty-one years, to admit his said brother as an acting partner in respect of the whole, or any part or parts of the share of him the said [Y. Z.] in the net gains and profits of the said copartnership business, and to assign or otherwise make over to his said brother, either the whole, or any part or parts of the share of the said [Y. Z.] in the said stock, monies, and effects of the said copartnership; and the said [A. Z.] may be admitted a partner as to the whole, or any part or parts, either at one time or at various times; And if the said [A. Z.] shall become a partner as to the whole as aforesaid, then, and immediately thereupon, the said [Y. Z.] shall be considered to have withdrawn from the said copartnership.

Or [Y. Z.] may bequeath by will his share to [A. Z.]

THAT it shall be lawful for the said [Y. Z.], by his will or any codicil thereto, to bequeath to his said brother [A. Z.] the whole or any part of the share of him the said [Y. Z.] in the stock, monies, and effects of the said copartnership, and the net gains and profits thereof.

If [Y. Z.] so bequeath his share to [A. Z.],

the latter may, on notice, be admitted an acting partner, if of age.

THAT if the said [Y. Z.] shall, after having made such bequest, die while engaged in the said copartnership, and the said [A. Z.] shall, within one calendar month after such death, give notice in writing to the said [A. B.] of his intention to become a partner in respect of the share or part so bequeathed to him as aforesaid; then and in such case the said [A. Z.] shall be admitted an acting partner in respect of such share or part so bequeathed to him as aforesaid; and if not then of the age of twenty-one years, his admission as an acting partner shall be postponed till he arrives

of them, or between the respective executors, administrators, or assigns of any of them, touching the construction of these

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at that age; and during his minority the whole of the business shall be carried on by the said [A. B.] (either alone or in conjunction with any son or sons who shall have been admitted a partner or partners as aforesaid); and he or they shall be accountable to the said [A. Z.], his executors or administrators upon his attaining his majority, or his death, whichever shall first happen, for the gains and profits which, during such minority, shall have arisen from the part or share so bequeathed to him the said [A. Z.] as aforesaid.

If not, [A. B.] shall carry it on for his benefit during his minority, and account accordingly.

THAT if any person or persons shall, under any of the provisions hereinbefore for that purpose contained, become either an acting or dormant partner or partners in respect of any such share or shares, or part or parts of a share, as aforesaid, then and in every such case, and immediately after any such person or persons shall so become a partner or partners as aforesaid, such person or persons shall, so far as relates to the share or shares, or part or parts of a share, in respect of which he, she, or they shall have so become a partner or partners as aforesaid, stand in the place of the partner from whom he, she, or they derived the same, and shall thenceforth, to the end of the said copartnership term of —— years, be entitled to such share, or such part or parts of a share, upon the same terms and conditions, and with, under, and subject to the same benefits, advantages, powers, provisions, restrictions, duties, regulations, conditions, and agreements in every respect as the person or persons, from whom he, she, or they derived such share, or part or parts of a share as aforesaid, would have continued entitled to such share, or part or parts of a share, if he had remained a partner in respect thereof, or as near thereto as *circumstances will admit of; save and except that, if any such new partner or partners shall die while engaged in the said copartnership, such copartnership shall not, as to the share, or part or parts of a share, of the new partner or partners so dying, (unless such new partner or partners shall, under the will or any codicil of the said [A. B.], be only a trustee or trustees for others of such share, or part or parts of a share), be continued after his, her, or their death, or re-

Any new partner so coming in shall stand in the place of the partner from whom he derived the share,

and be in all respects as an original partner;

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save, that if such new partner die,

the partnership shall not (except he be a trustee) be continued

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presents, or any clause, matter, or thing herein contained, or any account, valuation, or appraisement to be made as hereinbefore is mentioned, or any other matter, cause, or thing whatsoever in anywise relating to or concerning the said copartnership, and such doubt, question, difference, or dispute shall not be fully decided between or amongst themselves within one calendar month after the same shall arise, that then and so often as the same shall happen, such doubt,

[*283] question, difference, or dispute *shall, upon the request of any of them the said partners, or the executors, administrators, or assigns, of any of them, from time to time be reduced into writing, and be committed and referred to the hearing and arbitration of three indifferent persons, two of them to be chosen by the persons so doubting, differing, or in dispute, and a third by the persons first chosen for that purpose from time to time, within the space of two calendar months next after such request, and the award, order, or determination of the said three persons to be chosen as aforesaid, or any two of them, in the matter or matters so referred to them, shall be binding and conclusive upon the

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after his death by his representatives.

spective deaths, by his, her, or their executors, administrators, or legatees, or any of them, or by any other person or persons claiming by, from, or under him, her, or them, or any of them; And also, save and except that no person or persons who shall become a dormant partner or partners for the time being, shall be bound personally to attend, assist in, or in anywise interfere in the managing and conducting of the business of the said copartnership, or any part thereof, or in making out or taking of any of the accounts thereof, except the accounts to be made and taken on the —— day of —— in every year, and the accounts to be made and taken as hereinbefore is mentioned: Provided, nevertheless, that it shall be lawful for the person or persons who shall become a dormant partner or partners as aforesaid, to inspect and examine, once in every calendar month, but not oftener without the consent of the other partner or partners for the time being, on giving to such partner or partners three days' previous notice of his or their intention so to do, the account-books, letters, papers, and vouchers of the said copartnership, and to make extracts from the same."

No person becoming a dormant partner shall be bound to attend to the concern,

except to take and sign the yearly accounts. Such dormant partner may examine the accounts once a-month.

said persons so doubting, differing, or in dispute as aforesaid, and their respective heirs, executors, administrators, and assigns, and shall be performed, observed, and kept by them accordingly, without any further suit or trouble whatsoever; so as such award, order, or determination be made and set down in writing under the hands and seals of such three persons, or any two of them, within the space of —— days after all the said three persons shall be so elected as aforesaid. IN WITNESS, &c.

BETWEEN FOUR JEWELLERS.

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AGREEMENT *between one* PARTNER *and another Person to pay* HIM, *his* WIFE, *and Two* DAUGHTERS, *a* YEARLY SUM, *proportioned to his Share of the Profits of the Business* (*a*), *in Consideration of his Relinquishment of the Business in favour of the Covenantor.*

AGREEMENT TO PAY ANNUITY PROPORTIONED TO PROFITS.

THIS INDENTURE, made the —— day of ——, BETWEEN [A.], of &c., of the one part; and [C.], of &c., of the other part: WHEREAS, by indenture, bearing date on or about the —— day of —— *(recite articles of partnership between* [A.] *and* [B.] *shewing the nature of the business, the term of the partnership, the amount of capital to be contributed by the respective partners, and their shares in the profits).* AND WHEREAS, previously to the said copartnership between the said [A.] and [B.], the said trade or business of a wine or spirit merchant was carried on by the said [B.] and [C.] in copartnership, and the said [C.] retired

Parties.

Recital of indenture of partnership.

Recital of a previous partnership.

(*a*) This agreement would clearly constitute the annuitants partners, so as to render them liable to the demands of third persons upon the partnership; (*Vide ante*, p. 10); but, as it is not a stipulation to pay any given proportion of the profits as such, but an annuity, regulated by the amount of profits, the agreement would not, according to the distinction noticed, *ante*, p. 7, constitute a partnership between the parties themselves. The covenanting partner therefore could not call upon the covenantees to contribute towards the losses of the business.

AGREEMENT TO PAY ANNUITY PROPORTIONED TO PROFITS.

from the said trade or business for the purpose of enabling the said [A.] to enter into and form a copartnership with the said [B.]. [AND WHEREAS the said [C.], at the request of the said [A.], hath advanced unto the said [A.] the sum of 2000*l.*, in order to enable the said [A.] therewith to make up the said sum of £——, the share of the said [A.] of and in the said capital of £——; and hath also agreed

That [C.] had advanced [A.] 2000*l.* to make up his share of capital.

[*285] *to continue the said sum of 2,000*l.* in the hands of the said [A.] during the continuance of the said copartnership between him and the said [B.], without requiring any interest for the same]: AND WHEREAS the said [A.] hath agreed to enter into the covenants hereinafter contained, for payment of such yearly sums as are hereinafter mentioned, for the benefit of the said [C.] and [D.] his wife, and [E.] and [F.], two daughters of the said [C]: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said [C.] having retired from and relinquished the said trade or business of a wine merchant in favour of the said [A.], and for the purpose of enabling him the said [A.] to form a partnership with the said [B.] as aforesaid; and in consideration of all and singular the premises (*b*), he the said [A.] doth hereby,

Agreement for present deed.

Testatum.

(*b*) Care is taken, it will be observed, to avoid stating the annuities to be in consideration of the loan, in order to prevent any objection on the ground of usury. The answer to such objection, however, would be, that the covenantees have rendered themselves liable to third persons as partners. (See some remarks upon this, *ante*, p. 162). Perhaps, however, with a view to this point, it would be better to disconnect the loan of money altogether from the agreement to pay the annuities, in which case the clauses in brackets should be omitted, and A. should execute a separate deed of covenant, to secure the repayment of the 2000*l.* on the dissolution of the partnership. Such a deed would be simply as follows:—

DEED OF COVENANT TO PAY MONEY ON THE DETERMINATION OF A PARTNERSHIP.

"THIS INDENTURE, &c., BETWEEN [A.], of &c., of the one part; and [C.], of &c., of the other part; *(after reciting articles of partnership between* [A.] *and* [B.], *particularly the clauses fixing the duration of the partnership)*: AND WHEREAS, for the purpose of enabling the said [A.] to enter into the said recited partnership with the said [B.], the said [C.] agreed to lend and advance to the said [A.] the sum of 2000*l.*, without interest, during the continu-

for himself, his heirs, executors, and administrators, covenant and agree with the said [C]. his executors and administrators, in manner following, (that is to say): That he the said [A.] shall and will, from time to time, during the continuance of the said copartnership between the said [A.] and [B.], or during so long of the said copartnership as the said [C.] shall happen to live, pay or cause to be paid unto the said [C.], or his assigns, such yearly sum of lawful money of Great Britain, as shall be equivalent to two full third parts of the share or moiety (*c*) of the said [A.], of and in the clear gains and profits of, or to arise from the said copartnership trade or business to be carried on by the said [A.] and [B.] as aforesaid; such yearly sum to be paid on the —— day of ——, in each year; and the first yearly payment to be made on the said —— day of —— now next ensuing, together with a proportional part of the said yearly sum for the time which, at the decease of the said [C.], or the determination of the said copartnership, which shall first happen, shall have elapsed of the current year, such proportional part to be paid on demand. AND in case the said [C.] shall die during the continuance of the said co-

AGREEMENT TO PAY ANNUITY PROPORTIONED TO PROFITS.

Covenant by [A.] to pay to [C.] a sum equivalent to two-thirds of his share of the profits.

If [C.] die during the partnership, then to

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ance of the said partnership; and the said [C.] has, accordingly, this day paid and advanced the same to him the said [A.], as he does hereby acknowledge: NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, the said [A.], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [C.], his executors and administrators, that he the said [A.], his heirs, executors, or administrators, will, within one calendar month after the expiration or other sooner determination of the said partnership subsisting between the said [A.] and [B.] as aforesaid, well and truly pay or cause to be paid to the said [C.], his executors or administrators, the sum of 2000*l.* of lawful money of Great Britain and Ireland, without any deduction or abatement whatsoever; And it is hereby declared, that the said [A.], his heirs, executors, or administrators, shall not be liable to pay any interest in respect of the said loan in the meantime. IN WITNESS, &c.

(*c*) Or other share, *(as the case may be)*.

AGREEMENT TO PAY ANNUITY PROPORTIONED TO PROFITS.

pay his widow an annuity equivalent to a moiety.

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partnership, and the said [*wife*], the wife of the said [C.], shall be then living, he the said [A.] shall and will thenceforth, from time to time, during the continuance of the said copartnership between the said [A.] and [B.], or during * such part thereof as the said [*wife*] shall happen to live, pay or cause to be paid unto the said [*wife*], or her assigns, such yearly sum of lawful money aforesaid, as will be equivalent to one full moiety of the share of the said [A.] of and in the clear gains and profits of the said copartnership concern, by yearly payments: the first of such payments to be made at the expiration of one year next after the decease of the said [C.], together with a proportional part of the said yearly sum for the time which, at the decease of the said [*wife*], or the determination of the said co-partnership, which shall first happen, shall have elapsed of the current year, such proportional part to be paid on demand. And in case the said [C.] and [*wife*], his wife, shall both die during the continuance of the said copartnership, then, from and after the death of the survivor of them the said [C.] and [*wife*], his wife, the said [A.] shall and will thenceforth, from time to time, during the continuance of the said copartnership, or during such part thereof as the said [*daughter* E.] and [*daughter* F.], or either of them, shall happen to live, pay or cause to be paid unto the said [E.] and [F.], or the survivor of them, the yearly sum following, that is to say, if the said [E.] and [F.] shall be both living at the decease of the survivor of the said [C.] and [*wife*], his wife, then unto the said [E.] and [F.] during their joint lives, as tenants in common, such yearly sum as will be equivalent to one-third part of the share of the said [A.] of and in the clear gains and profits of the said copartnership trade or concern, such yearly sum to commence from the day of the decease of the survivor of them the said [C.] and [*wife*]; and the first payment thereof to be made at the expiration of one year after such decease, together with a proportional part of the said yearly sum for the time which, at the decease of either of them the said [E.] and [F.] who shall first die, or at the determination of the said copartnership, which shall first happen, shall have elapsed of the current year, such proportional part to be paid upon demand; and after the death of either of them the said [E.] and [F.] who shall first die, or in case only one of them shall be living

In case [C.] and wife both die, then to their two daughters, an annuity equivalent to one third.

After the death of either of them, then to the sur-

at the decease of the survivor of the said [C.] and [*wife*], his wife, then unto the survivor of them the said [E.] and [F.], and *her assigns, such yearly sum as will be equivalent to one-fourth part of the share of the said [A.] of and in the said clear gains and profits as aforesaid, to commence from the time of the decease of the other of them the said [E.] and [F.], or of the survivor of them the said [C.] and [*wife*], as the case may be; and the first payment to be made at the expiration of one year from the time of such decease, together with a proportional part of the said lastly-mentioned yearly sum for the time which, at the decease of the survivor of the said [E.] and [F.], or the determination of the said copartnership, which shall first happen, shall have elapsed of the current year, such proportional part to be paid on demand (*d*).

AGREEMENT TO PAY ANNUITY PROPORTIONED TO PROFITS.

vivor an annuity equal to one fourth.

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[*And lastly*, the said [C.], for himself, his heirs, executors and administrators, doth hereby covenant with the said [A.], his executors and administrators, that he the said [C.], his executors or administrators, will not at any time during the continuance of the said copartnership, call in or compel payment of the said sum of 2000*l.* so lent by him to the said [A.] as aforesaid, nor shall or will require the payment of any interest upon or in respect of the same.] IN WITNESS, &c.

Covenant by [C.] not to call in said 2000*l.* nor require interest.

(*d*) There having been in the partnership deed a provision directing the accumulation of 1000*l.* out of the profits for a certain number of years, the following clause was added to the present deed:—

"PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties hereto, that in calculating the clear gains and profits of the share of the said [A.] of and in the said copartnership trade or concern, for the purpose of ascertaining the amount of the said yearly sum payable for the time being under the covenant aforesaid, the said clear gains and profits of the said copartnership trade and concern shall be estimated exclusively of and after deducting the said yearly sum of 1000*l.*, which, by virtue of and according to the said recited indenture, is to be deducted from the net gains and profits of the said copartnership business, and to be left in the said trade for the purpose of accumulation as aforesaid."

In calculating the clear gains a certain sum to be deducted.

INDORSED AGREEMENT VARYING ARTICLES.

AGREEMENT *by* PARTNERS *(by Indorsement)*, VARYING *one of the* STIPULATIONS *of the Partnership Articles.*

THIS INDENTURE, made the —— day of ——, BETWEEN the within-named [A. B.], of the one part; and the within-named [C. D.], of the other part: WHEREAS it has been found inconvenient to make an annual inventory and valuation of the partnership stock, property, and effects of the said [A. B.] and [C. D.], pursuant to the covenant in that behalf contained in the within-written indenture, and accordingly such inventory and valuation have been taken by the said parties at more distant periods or intervals (*a*):

Rule where the annual account, which is to regulate the share of a deceased partner, is omitted to be taken.

(*a*) Where partners stipulate to settle accounts periodically, and the share of a deceased partner in the stock and profits is to be regulated by the last account preceding his decease; bu the accounts are not taken at the prescribed periods, so that, at the decease of the partner, there is, in fact, no account by which, according to the literal construction of the articles, the share can be ascertained, equity will consider that as done which was agreed to have been done, and will accordingly hold the deceased partner to be entitled to the same share as would have belonged to him if the accounts had been adjusted at the proper time, but computed from the last *actual* settlement.

Thus, in the late case of *Pettyt* v. *Jameson*, Madd. & Geld. 146, where the articles of partnership between the plaintiff's testator and the defendant provided that the accounts should be settled upon every 25th of March; and further, that, if either of the partners should die during the partnership term, his interest should be regulated by the last yearly settlement, and that he should have no concern with profit or loss from that time; but his executors should, from that time, receive interest at *5l. per cent.* on the sum due to him at the last yearly settlement. The plaintiff's testator died on the 13th February, 1813. For several years before the testator's death the partners had not settled their accounts on the 25th of March, but the settlements were made at irregular and more distant intervals. The last settlement was on the 5th November, 1811.

INDORSED AGREEMENT VARYING ARTICLES.

AND WHEREAS, by reason of this alteration, it has been deemed expedient to annul and make void the provision contained in the within-written indenture, by which the share or interest of either of the said parties dying before the expiration of the within-mentioned partnership term of —— years in the joint stock, profits, and effects of the said [A. B.] and [C. D.], is declared to be regulated and fixed by the last inventory and valuation preceding the decease of such partner, and to substitute for such provision the agreement hereinafter contained: NOW THIS INDENTURE WITNESSETH, that in consideration of the premises, each of them the said [A. B.] and [C. D.] for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the other of them, his

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The defendant had begun to take steps for a further settlement in October, 1812, but the testator then refused to come to a settlement.

The plaintiff claimed a share in the profits up to his death, there having been no annual settlement according to the articles. The defendant insisted that the account of profits was to cease with the last actual settlement in November, 1811. The Vice-Chancellor observed, that the articles had two plain intentions; that there should be an annual settlement, and that the estate of a deceased partner should receive no profits for the fraction of he year since the last annual settlement. That the settlement of the 5th November, 1811, was to be considered as a settlement substituted by the agreement of the parties in the place of the settlement stipulated for in the articles; that if the testator had died on the 1st October, 1812, it could not have been contended that his estate was to take profits subsequently to the 5th November, 1811, being the last settlement within a year of the death; and if this were to be treated in that case as a settlement within the spirit of the articles *against* the testator's estate, it must be equally considered as a settlement *for* the testator's estate, that is, as a settlement of the 5th November, 1811, which bound each party to come to the next annual settlement on the 5th November, 1812; that the Court must act upon that which ought to have been done as if it had been done, and must declare the testator's estate entitled to a share in the profits up to the 5th November, 1812, being the day which ought to have been the last annual settlement before the testator's death.

In this case it will be perceived the Court did not wholly disregard the clause in question, because it had not been literally adhered to, but acted upon the principle of that provision so far as the conduct of the parties admitted of its application. (See further as to neglected clauses in partnership deeds, *ante*, p. 30).

INDORSED AGREEMENT VARYING ARTICLES.

executors or administrators, in manner following, (that is to say), that in case either of them the said parties hereto shall depart this life before the expiration of the said term of —— years, the personal representative or representatives of the party so dying shall have and be entitled, in right of such deceased partner, to one moiety or equal half share in the profits of the said partnership business up to the period of the decease of the party so dying as aforesaid, the hereinbefore mentioned clause or provision contained in the within-written articles to the contrary notwithstanding; *And further*, that in case, upon the decease of the partner so dying as aforesaid, the surviving partner shall be desirous of purchasing the share of the deceased partner in the partnership stock, credits, property, and effects, and of such desire shall give to the personal representative or representatives of the said deceased partner a notice or intimation in writing, within three calendar months after the decease of the partner so dying as aforesaid, or in case there should be no representative of such deceased partner for the period of two calendar months after his decease (*b*), then within one calendar month after there shall be such representative; then, and in either of the cases aforesaid, it shall be lawful for the surviving partner to purchase the share and interest of the said deceased partner of and in the said partnership stock, credits, property, and effects, at a valuation to be made by two indifferent persons, one to be chosen by the representative or representatives of the deceased partner, and the other by the surviving partner; or in case either of them should neglect, after seven days' notice in writing from the other, to nominate such referee, then, at a valuation to be made by the referee who shall have been actually nominated by the other of the said parties, and such other person as such referee shall nominate and choose. (*State how the amount of the valuation is to be paid or secured, and provide for the event of the surviving partner declining to purchase*). IN WITNESS, &c.

(*b*) This is a possible case, as the partner might die intestate, and no administration might be taken out during the prescribed period.

TRANSFER OF MOIETY OF SHARE.

DEED *of* ASSIGNMENT *(indorsed on Articles) by which* ONE *of the* PARTNERS, *with the Consent of the others,* ASSIGNS *a* MOIETY *of his* SHARE *to a* THIRD PERSON *who is* ADMITTED *into the* PARTNERSHIP. MUTUAL COVENANT *by the old Partners and new Partner to* PERFORM *the* ARTICLES.

THIS INDENTURE, made the —— day of ——, BETWEEN the within-named [A. B.], of the first part; the within-named [C. D.] and [E. F.], of the second part; and [G. H.], of ——, attorney at law, of the third part: WHEREAS the said [A. B.], [C. D.], and [E. F.], from the period of the date and execution of the within-written indenture down to the present time, have carried on the profession or business of an attorney, solicitor, and conveyancer in partnership, pursuant to the covenants and agreements contained in the within-written indenture: AND WHEREAS the said [A. B.], with the privity and consent of the said [C. D.] and [E. F.], hath contracted with the said [G. H.] for the absolute sale to him of one moiety of his the said [A. B.'s] one-third share of and in the good-will (*a*), property, and

Parties.

Recital.

(*a*) Though, as observed in an antecedent note (*vide ante*, p. 46), the sale of the good-will of an attorney's business is so far valid that an action at law may be maintained under the contract for the consideration money, provided the mode of its execution be sufficiently pointed out; yet it does not necessarily follow that the contract is so free from objection, on the grounds of moral propriety, that a Court of equity will lend its extraordinary aid by enforcing performance; and independently of this consideration, if the instrument fails to describe the particular acts to be performed by the vendor in carrying the agreement into effect, the Court is unable, on account of the impossibility of ascertaining, from the nature of the contract itself, what those acts are, to decree the specific execution of the agreement, but leaves the parties to their legal remedies.

Equity will not decree the specific performance of a contract for the sale of the good-will of an attorney's business.

Thus, in the case of *Bogon* v. *Farlow*, 1 Mer. 459, a bill was filed for

TRANSFER OF MOIETY OF SHARE.

effects of the said partnership, (except the credits thereof), at or for the price or sum of £——; And it hath been agreed

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the specific performance of an agreement contained in the following paper, which was signed by the plaintiff and defendant, and dated 23rd June, 1814:—

"Propositions between Mr. Farlow and Mr. Bozon.

"Mr. Farlow proposes to give 3075*l.* to Mr. Bozon for his business on the following condition:—First, 1000*l.* to be paid on the 1st of September next, from which time the business to be carried on in their joint names, and so to continue till within ten days from the end of Easter term next. The remaining 2075*l.* to be paid as follows: 1000*l.* in Easter term, 1816, and 1075*l.* in Easter term, 1817. The whole profits of the business will, to within ten days of the end of Easter term next, be received by the said Mr. Bozon, and, from that period, the whole business to be transferred to Mr. Farlow. The payment of the 2075*l.* to be secured by the warrant of attorney of Mr. Farlow, to be given at the time of signing this agreement, on which judgment may be immediately entered up; and if Mr. Bozon wishes it, Mr. Farlow is to give three notes, two for 1000*l.* each, and the other for 1075*l.*, payable at the times within mentioned. Mr. Bozon, on his part, undertakes that the net profits of his business for the last three years has been 2000*l.* a-year, and upwards. The fixtures of Mr. Bozon's office to be taken by Mr. Farlow at a fair valuation, and Mr. Farlow is to have the option of purchasing the lease of Mr. Bozon's dwelling-house and offices, at the sum he has laid out in the improvements thereof, the same not to exceed 200*l.*, and to make his election whether he will take such house on or before Michaelmas-day next. From the 1st of September, the business to be carried on in the names of Bozon and Farlow. In case any articled clerk or clerks shall be taken by Mr. Bozon alone, or Mr. Bozon and Mr. Farlow jointly, one third of the premium to be received is to be retained by Mr. Bozon, and the remaining two-thirds to be paid to Mr. Farlow, it being understood that no clerk is to be taken to board in the house. Mr. Farlow, on Mr. Bozon's going out, to take an assignment of the articles, with usual clauses."

Before the completion of this arrangement, disputes arose between the parties in consequence of an alleged misrepresentation on the part of the plaintiff; and the defendant refusing to perform the agreement, the present bill was filed.

Sir *W. Grant*, M. R.—"My principal doubt is, whether, supposing all other objections to be surmounted, this is an agreement which a Court of Equity can carry into execution. The defendant agrees to give 3075*l.* for the plaintiff's business, and the plaintiff agrees that, at a certain period,

that such moiety shall be assigned to and vested in the said [G. H.] in manner hereinafter expressed; and that the said

TRANSFER OF MOIETY OF SHARE.

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his business shall be transferred to the defendant. Now, the business of an attorney consists in his being employed by others, from the confidence which they repose in his skill and integrity. In what way then is the Court to decree the transfer of such a business? What is it that I am to direct Mr. Bozon to do towards the fulfilment of his part of the contract? The Court must be able to prescribe to both parties what it is that they are reciprocally to perform. The very ground on which the jurisdiction of a Court of Equity in decreeing a specific performance is founded, is, that it is able to give possession of the very thing which is the subject of the agreement, and which a Court of Law cannot do. But, when I order Mr. Farlow to pay his 3075*l.*, in what way am I to proceed in order to put him in possession of Mr. Bozon's business? What acts am I to direct Mr. Bozon himself to perform, in order to effect that purpose? In the case of *Bunn* v. *Guy*, 4 East, 190, there was no occasion to consider whether the agreement could be specifically performed; the only question was, whether there was a legal consideration for the securities that had been actually executed. In that case, however, there were means devised, by which Mr. Carpenter's business might have been made to pass into the hands of the other parties; for it was stipulated that he should not, in future, practise as an attorney within 150 miles of London; that he should permit his name to be used in the firm for a considerable time after he quitted the business; lastly, and principally, that he should endeavour, by all the means in his power, to influence and induce his clients to become the clients of Bunn and Guy. The Lord Chancellor doubted not only the propriety, but the legality, of some of those conditions; and though it was ultimately determined that they were not illegal, I think that he would hardly have decreed them to be specifically executed. Does the present case furnish any ground upon which I can decree Mr. Bozon to perform any of the acts, the performance of which was stipulated in that of *Bunn* v. *Guy?* The only part of this agreement which seems at all to have a tendency to provide for its completion by introducing the defendant into the plaintiff's business, is the stipulation that it shall be carried on in their joint names from the 1st of September, 1814, till within ten days of the end of Easter Term, 1815, a stipulation which has never been acted upon, and the period for acting upon which had expired long before the hearing of the cause. The decree which I should have to make would, therefore, be nothing more than an order upon Mr. Farlow to pay his purchase-money; or, if I were to go any further, and to introduce the words, 'upon Mr. Bozon's transferring his business to him,' I should feel myself greatly at a loss in telling the one party what he is to do, or the other what

Sale of the good-will of an attorney's business.

TRANSFER OF MOIETY OF SHARE.

Testatum.

several parties hereto shall enter into the covenants hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, and also in consideration of the sum of £—— of &c., paid by the said [G. H.] to the

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he is entitled to exact. It may be said, however, that it constitutes part of the agreement, that 'the usual clauses' shall be inserted in the instrument to be executed, and, therefore, that, on the basis of that agreement, such clauses might be introduced into it, as would sufficiently provide for the defendant's security. But it has not been at all suggested what are the clauses which, independently of positive stipulation, belong to an agreement of this sort, as 'the usual clauses.' We have, in the case of *Bunn* v. *Guy*, an instance of such clauses as have been introduced into an agreement of the same nature with the present. But are they to be considered as stipulations so annexed to this sort of transaction as to be introduced as 'the usual clauses' into the instrument which is to be executed on the basis of the present agreement? Is Mr. Bozon to be bound, for instance, not to carry on his business of an attorney within 150 miles of Plymouth, or within any and what other distance from that place, when it is manifest, from direct evidence in regard to what passed at the time when this agreement was framed, that no such point ever came into discussion between the parties; and when it has been decided, in the case of *Crutwell* v. *Lye*, 17 Ves. 335, that, unless restrained by positive contract, a man may, after selling the good-will of a trade, set up a business of the same kind, at the same place, whenever he pleases. Then, is Mr. Bozon, in order to allure customers, to permit his name to remain in the firm after his concern in the business has entirely ceased? Admitting that it is not illegal so to contract, yet is it a stipulation so extremely proper for a Court of Equity to sanction, that it will introduce it, as of course, into an agreement, the parties to which had never expressed any intention of resorting to it? I apprehend not; and I should think the same, likewise, of the remaining covenant, which is to influence customers to employ the one party to the agreement, because the other party is paid for so influencing and inducing them. There are no means, therefore, that I can prescribe by which Mr. Farlow, when he has paid his money, is to have any thing secured to him in return for it. I am not called upon to determine whether this is a void agreement: but I think that it is an agreement which a Court of Equity is not able to carry into execution."

And it is to be gathered from Lord *Eldon's* observations in *Baxter* v. *Conolly*, 1 Jac. & Walk. 582, that his Lordship's opinion was, that in *no* case would a Court of Equity execute a contract for the sale of the good-will of a business.

said [A. B.] at or immediately before the execution of these presents, the receipt of which said sum of £—— the said [A. B.] doth hereby acknowledge, and therefrom doth release the said [G. H.], his heirs, executors, and administrators, he the said [A. B.], (with the privity and consent of the said [C. D.] and [E. F.], testified by their severally executing these presents), *hath* granted, bargained, sold, and assigned, and by these presents *doth* grant, &c. unto the said [G. H.], his executors, administrators, and assigns, ALL THAT one undivided moiety or equal half part of the one third part or share of him the said [A. B.] of and in the good-will of the said partnership business, and the gains and profits henceforth to arise therefrom, and of and in the printed books, office furniture, account-books, stationery, deeds, and other documents, and drafts and copies of deeds and documents, and all other property and effects of and belonging to the said partnership (except the credits and sums of money owing to the said partnership, and all securities for the same): *And* all the right, title, interest, benefit, claim, and demand whatsoever, both at law and in equity, of him the said [A. B.] of, in, and to the said moiety and premises; TO HAVE, RECEIVE, AND ENJOY the said moiety of one third part, and other the premises hereby assigned unto the said [G. H.], his executors, administrators, and assigns, to and for his and their absolute use and benefit, in as ample and beneficial a manner as he the said [A. B.] held and enjoyed the same: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and in consideration of the premises, they the said [C. D.] and [E. F.], at the request of the said [A. B.], do hereby admit the said [G. H.] into the said partnership established by the within-written indenture, as an acting partner therein, in respect of the one moiety hereby assigned of the one third share of the said [A. B.] in the said partnership business as aforesaid: AND THIS INDENTURE MOREOVER WITNESSETH, that, in further pursuance of the said *agreement, and in consideration of the premises, and of the trust and confidence which the said [A. B.], [C. D.], [E. F.], and [G. H.] have, and repose in each other, each of them the said [A. B.], [C. D.], [E. F.], and [G. H.], for himself, his heirs, executors, and administrators, doth

TRANSFER OF MOIETY OF SHARE.

Further *testatum*.

Further *testatum*.

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TRANSFER OF MOIETY OF SHARE.

hereby covenant with the others and each other of them, their and his executors and administrators, that they the said [A. B.], [C. D.], [E. F.], and [G. H.], shall and will henceforth become, continue, and be partners in the profession or business of an attorney, solicitor, and conveyancer for all the residue now unexpired of the said term of —— years mentioned in the within-written indenture, under and subject to the provisions and stipulations contained in the said indenture; and shall and will at all times hereafter faithfully perform and keep all and every the covenants, provisoes, and agreements contained in the said indenture, so far as the same are now subsisting and capable of taking effect; and that the several rights, shares, and interests of the said respective parties, of and in the partnership property, profits, and effects, held and enjoyed by the said parties respectively, under and by virtue of the within-written indenture, and of these presents, or either of them, shall be subject and liable to the provisions of the said indenture, as fully and effectually, to all intents and purposes, as if the said provisions had been incorporated with and inserted in these presents. *(Add covenants by [A. B.] with [G. H.] that he had a right to assign—for quiet enjoyment, and for further assurance).* IN WITNESS, &c.

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DEED OF DISSOLUTION, WITH ORDINARY CLAUSES.

DEED *of* DISSOLUTION *of* PARTNERSHIP *between two, where one Partner pays to the other a* SUM *of* MONEY *in lieu of his Share of the* STOCK IN TRADE, *&c., to be secured by* BOND. ASSIGNMENT *of* SHARE. *Mutual* RELEASE, *and* ORDINARY COVENANTS. *(A short Form).*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [A.], of &c., oilman and drysalter, of the one part; and [B.], of &c., oilman and drysalter, of the other part:

Recital of partnership.

WHEREAS the said [A.] and [B.] have for some time carried on the trade or business of an oilman and drysalter in

DEED OF DISSOLUTION, WITH ORDINARY CLAUSES.

partnership, under and subject to the covenants and provisions contained in a certain indenture, bearing date the —— day of ——: AND WHEREAS the said [A.] and [B.] have mutually agreed to dissolve the said partnership on and from the day of the date hereof: AND WHEREAS, upon the treaty for the said dissolution of partnership, it was agreed that the said [B.], (who intends to carry on the said trade or business of an oilman and drysalter alone), should have for his own use all the share of him the said [A.] in the stock in trade, credits, and effects of the said partnership, on his taking upon himself the debts and obligations of the said partnership, and paying to the said [B.] the sum of £——, by two equal instalments of £—— on the —— day of —— and the —— day of —— next ensuing, with interest thereon at the rate of *5l. per cent. per annum*, to be secured by the joint and several bond of the said [B.], and of [*surety*], of ——, as his surety: AND WHEREAS, in pursuance of the said agreement, the said [B.] and the said [*surety*], as his surety, have, by their bond, bearing even date with these presents, become bound unto the said [A.] in the penal sum of £——, con-

Of agreement to dissolve.

Of terms of dissolution.

Of bond given by assignee partner and a surety.

*ditioned for the payment by the said [B.] and [*surety*], or either of them, their or either of their heirs, executors, or administrators, unto the said [A.], his executors, administrators, or assigns of the said sum of £——, by such instalments, and with such interest as aforesaid: NOW THIS INDENTURE WITNESSETH, that, in further performance of the said recited agreement, they the said [A.] and [B.] *have* determined and dissolved, and by these presents *do* determine and dissolve their said partnership, and do hereby declare that the same and the hereinbefore mentioned indenture of partnership, and every clause and thing therein contained, shall henceforth cease and be void to all intents and purposes whatsoever. AND each of them the said [A.] and [B.] doth hereby for himself, his heirs, executors, and administrators, remise, release, and for ever quit claim unto the other of them, his heirs, executors, administrators, and assigns, all and all manner of actions, suits, claims, and demands whatsoever, at law or in equity, which either of them the said parties, his heirs, executors, or administrators now hath, or hereafter may have, or might have

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Testatum.

Parties declare the partnership to be dissolved.

Mutual release.

DEED OF DISSOLUTION, WITH ORDINARY CLAUSES.

had, against the other of them, his heirs, executors, or administrators, by reason of the said partnership, or of any covenant or provision contained in the hereinbefore mentioned indenture of partnership, or otherwise in relation thereto; but so, nevertheless, as not to prejudice or affect the hereinbefore mentioned bond, or the covenants herein contained: AND THIS INDENTURE ALSO WITNESSETH, that, in further performance of the said recited agreement, and in consideration of the premises, he the said [A.] [*hath* assigned and transferred, and] by these presents *doth* assign, &c., unto the said [B.], his executors, administrators, and assigns, ALL *the moiety or one half part* of him the said [A.], of and in all and singular the goods, wares, and merchandizes, stock in trade, credits, and effects belonging, due, and owing to them the said [A.] and [B.], as partners as aforesaid: And all the right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said [A.] of, in, and to the said premises: TO HAVE, RECEIVE, AND TAKE the same moiety, and other the premises hereby assigned, unto the said [B.], his executors, administrators, and assigns, for his and their own proper use and benefit, and as and for his and their own proper goods and chattels absolutely for ever; AND for the more effectually enabling the said [B.], his executors or administrators to receive and recover the said several credits and effects of the said partnership, he the said [A.] doth by these presents absolutely and irrevocably constitute and appoint the said [B.], his executors or administrators, his true and lawful attorney and attornies in the joint names of the said [A.] and [B.], or in the name or names of the said [A.], his executors or administrators, but for the exclusive benefit, and at the sole costs and risk of the said [B.], his executors or administrators, to demand, call in, and receive from all persons whom it may concern, all and singular the credits, sums of money, and effects of the said partnership, and to give receipts and other sufficient discharges for the same respectively, and to use or adopt all such legal or equitable remedies or proceedings for recovering and getting in the said credits and effects respectively as may be deemed expedient; and for all or any of the purposes aforesaid, from time to time to appoint a substitute or substitutes, and

Further *testatum.*

Assignment of share.

Habendum.

[*300]

Letter of attorney.

DEED OF DISSOLUTION, WITH ORDINARY CLAUSES.

such substitution at pleasure to revoke; and generally to do, or cause to be done, whatsoever shall be requisite for giving to the said [B.], his executors or administrators, the full benefit of the assignment hereby made. And the said [A.], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [B.] his executors, administrators, and assigns in the manner following, (that is to say), that he the said [A.] hath not at any time or times heretofore contracted any debt or obligation which can or may charge or affect the said [B.], his executors or administrators, or the said joint stock or effects of the said partnership, or any part thereof respectively; nor hath he the said [A.] received or discharged any of the credits of the said partnership, except as appears by entries duly made in the books of the said partnership; nor done any act whereby the share and premises hereby assigned, or any part thereof, may be charged or incumbered in any manner howsoever; And that he the said [A.], his executors or administrators, will at all times hereafter ratify and confirm all and whatsoever the said [B.], his executors, administrators, or assigns, shall lawfully do or cause to be done by virtue of the power *hereinbefore contained (*a*); And shall and will at all times hereafter, on the request, and at the costs of the said [B.], his executors, administrators, or assigns, make, do, and execute every such further assignment, authority, assurance, act, or thing whatsoever, for the more effectually vesting in the said [B.], his executors, administrators, or assigns, the premises hereby intended to be assigned, and enabling him and them to receive the same, as by the said [B.], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably required; *And moreover*, that he the said [A.], his executors or administrators, shall not nor will, at any time hereafter, revoke the power or authority hereinbefore given to the said [B.], his executors and administrators, nor receive, compound, or discharge any of the goods, credits, or effects, one moiety whereof is intended to be hereby assigned, nor shall release, disavow, or become nonsuit in any action or suit which may be brought by

Covenant by [A.] that he has not contracted any debt, or received any of the credits, except as appears by the books.

To confirm what shall be done under the power.

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For further assurance.

Not to revoke power, or receive credits.

(*a*) This agreement is often contained, but with some violation of technical propriety, in the power itself.

DEED OF DISSOLUTION, WITH ORDINARY CLAUSES.

the said [B.], his executors or administrators, by virtue of the said power, nor do any other act or thing in derogation of the assignment hereby made, or the powers or authorities hereby given; AND the said [B.] doth hereby for himself, his heirs, executors, and administrators, covenant with the said [A.], his heirs, executors, and administrators, that he the said [B.], his heirs, executors, or administrators, will, within —— calendar months from the date hereof, pay, or cause to be paid, all and every the debt and debts, sum and sums of money due and owing from or by the said [A.] and [B.] in respect of their said partnership; and will at all times hereafter effectually keep harmless and indemnified the said [A.], his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, from and against all costs, damages, and expenses in respect [*302] thereof (*b*), and also from and against all *costs, damages, and expenses by reason of any action or suit, or actions or suits, which shall or may be brought or instituted by the said [B.], his executors or administrators, in the name or names of the said [A.], his executors or administrators, by virtue of the power or authority hereinbefore contained, or of any act, matter, or thing in relation thereto. IN WITNESS, &c.

Covenant by [B.] to pay the debts, and indemnify [A.] therefrom.

(*b*) It seems proper to add:

"except only such debts, if any, as may have been contracted by the said [A.] on account of the said partnership, but which have not been entered in the books thereof."

DISSOLUTION OF PARTNERSHIP BETWEEN TWO.

DEED *of* DISSOLUTION *of* PARTNERSHIP *between two;* ASSIGNMENT *by one of his* SHARE *to the* OTHER. LETTER *of* ATTORNEY. USUAL COVENANTS. MUTUAL RELEASE. *(Variation where certain of the Credits are excepted out of the Assignment, and vested in the assignor Partner)* (*a*).

THIS INDENTURE, made &c., BETWEEN [P.], of &c., of the one part; and [G.], of &c., of the other part: WHEREAS the said [P.] and [G.] have for some time past carried on the trade or business of a linen-draper in partnership, and have been interested in the capital joint stock and profits of the said partnership, in the shares following (that is to say), the said [P.] in four seventh parts thereof, and the said [G.] in three seventh parts thereof, upon the terms, and subject to the conditions and agreements contained in a certain indenture bearing date the —— day of ——, and made between the said [P.] of the one part, and the said *[G.] of the other part, and of a certain memorandum indorsed thereon, signed by both the said parties, bearing date the —— day of —— now last past: AND WHEREAS the said [P.] and [G.] have mutually agreed to determine and dissolve their said partnership: AND WHEREAS the said parties have this day stated and settled a final account between them of all credits, debts, and other effects, and all transactions of or concerning their said partnership: AND WHEREAS the said [G.] hath agreed that the said [P.] (who intends to carry on the said business by himself alone) should have

Parties.

Recital of partnership.

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Recital of agreement to dissolve the partnership, and of the terms of dissolution.

(*a*) In this case the retiring partner, by whom the assignment was made, was to have, in addition to the sum of money paid to him, the exclusive property in certain of the debts. In order that the conjunction of this circumstance might not render the form less extensively useful as a general precedent, the clauses applicable to it have been detached from the rest, and placed in the notes.

DISSOLUTION OF PARTNERSHIP BETWEEN TWO.

for his own use all the part and share of him the said [G.] of and in the said goods, merchandize, stock in trade, credits, and effects (*b*), and the said [G.] hath consented to invest the said [P.], his executors and administrators, with the several powers, and to enter into the several covenants by him hereinafter contained; in consideration whereof, the said [P.] hath agreed to pay to the said [G.] the sum of £—— (*c*); *And further*, that the said [P.] shall and will (*d*) pay the several debts owing from or by the said parties in respect of their said partnership, and indemnify the said [G.], his heirs, executors, and administrators, from and against the same, and from and against all costs and expenses relating thereto; and shall likewise enter into the several covenants hereinafter contained on the part of the said [P.], his executors or administrators, to be performed:

Testatum. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited agreement, they the said [P.] and [G.] have mutually determined and dissolved, and by these presents do mutually determine and dissolve, their said partnership *and joint trade, and do hereby declare that the same, and the said indenture of partnership, and every clause, article, matter, and thing therein contained, shall henceforth absolutely cease and be void: AND THIS INDENTURE FURTHER WITNESSETH, that in further pursuance of the said recited agreement, and in consideration of the premises, and also in consideration of the sum of £——, of lawful money of Great Britain and Ireland, paid by the said [P.] to the said [G.], at or immediately before the execution of these presents, the receipt

Parties dissolve the partnership.

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Further *testatum.*

Variation where certain credits are excepted.

(*b*) "other than and except the several credits comprised in the schedule hereunder written."

(*c*) "and also that the said [G.] shall receive for his own use the said several credits comprised in the said schedule hereunder written, which said sum of £——, and the said several credits, amount together to the sum of £——."

(*d*) "empower the said [G.], his executors and administrators, to get in and receive the said last-mentioned credits, and shall and will"

DISSOLUTION OF PARTNERSHIP BETWEEN TWO.

whereof, &c. (*e*), he the said [G.] *hath* granted, bargained, sold, assigned, and transferred, and by these presents *doth* grant, &c., unto the said [P.], his executors, administrators, and assigns, ALL THE three-seventh parts, or other the share and proportion of him the said [G.] of and in all and singular the goods, wares, and merchandize, stock in trade, credits, effects, matters, and things belonging and owing to them the said [P.] and [G.] as partners and joint traders as aforesaid (*f*); AND all the right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said [G.], of, in, and to the same premises: TO HAVE, receive, take, and enjoy the said premises unto the said [P.], his executors, administrators, and assigns, for his and their own proper use and benefit; (*add power of attorney, ut ante*, p. 300): AND the said [G.], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [P.], his executors or administrators, in manner following, (that is to say), that he the said [G.] hath not at any time heretofore contracted any debt or debts, or become bound or engaged to pay any sum or sums of money which can or may charge or affect the stock in trade, goods, credits, or effects of the said partnership, or any part or parts thereof respectively, or for the recovery whereof he the said [P.], his executors or administrators, shall or may be liable to be sued in any Court of law or equity whatsoever, (other than and except such debts or sums of money as *are duly entered in the books kept by the said [P.] and [G.] for that purpose (*g*); And that he the said [G.] hath not at any time heretofore assigned, released, discharged, or received any of the credits of the said partnership, other

[G.] assigns his share in the partnership to [P.]

Habendum to [P.]

Covenant by [G.] that he has not contracted any partnership debts, except such as are entered in the partnership books.

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And that he has not before assigned or incumbered the premises.

(*e*) "and of the assignment hereinafter made by the said [P.]."

(*f*) "(other than and except the several credits specified in the said schedule hereunder written)."

(*g*) "or as have been fully made known to the said [P.] before the execution of these presents†."

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† Perhaps, in order to exclude the uncertainty attending oral communications, it is better to omit these words.

DISSOLUTION OF PARTNERSHIP BETWEEN TWO.

than and except such as are entered as received in the books of the said partnership (*h*), or done any other act whereby the credits and effects hereby assigned, or intended so to be, or any part thereof, have or has been, or shall or may be, charged or incumbered in any manner howsoever; *And that* he the said [G.], his executors and administrators, will allow, ratify, and confirm whatsoever the said [P.], his executors, administrators, or assigns, shall lawfully do, by virtue of the power or authority hereinbefore contained, and will from time to time and at all times, on the request and at the costs of the said [P.], his executors, administrators, and assigns, make, do, and execute all such further assignments, powers, assurances, acts, and things for the more effectually assigning to and empowering and enabling the said [P.], his executors, administrators, and assigns, to recover and receive all or any of the goods, wares, merchandize, stock in trade, credits, and effects mentioned to be hereby assigned respectively for his and their own proper use and benefit, as by the said [P.], his executors, administrators, or assigns, or his or their counsel learned in the law, shall be reasonably advised and required; *And moreover*, that he the said [G.], his executors or administrators, will not at any time hereafter revoke or make void the power or authority hereinbefore given to the said [P.], his executors and administrators, nor compound, release, or become nonsuit in any action or suit which may be commenced or instituted by him or them by virtue thereof, nor do any other act by means *whereof the recovery of the credits and effects hereby assigned, or intended so to be, or any part thereof, may be impeded or delayed, nor interfere or intermeddle in or about the premises, further or otherwise than the said [P.], his executors, administrators, or assigns shall direct or require (*i*); And, for the considerations aforesaid,

And for further assurances.

And that he will not revoke powers herein contained.

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[P.] covenants

(*h*) "or the receipt whereof has been fully made known to the said [P.] as aforesaid."

Variation where an assignment is made of certain excepted credits.

(*i*) "And this indenture further witnesseth, that, in pursuance of the said recited agreement in this behalf, and in consideration of the premises, he the said [P.] *hath* granted, bargained, sold, assigned, and transferred, and by

DISSOLUTION OF PARTNERSHIP BETWEEN TWO.

he the said [P.], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [G.], his executors and administrators, that he the said [P.], his heirs, executors, or administrators, will in due course pay, or cause to be paid, all and every the debt and debts, sum and sums of money, owing from or by the said [P.] and [G.] in respect of their said late partnership or joint trade, and which have been duly entered in the partnership books, or are otherwise known to the said [P.]; and shall and will save and keep harmless and indemnified the said [G.], his heirs, executors, and administrators, and *his and their lands and tenements, goods and chattels, of, from, and against all costs, charges, damages, and expenses in respect thereof, and also of, from, and against all costs, charges, damages, and expenses by reason or in respect of any action or suit, or actions or suits, which shall or may be brought or prosecuted by the said [P.], his executors or administrators, wherein the name or names of the said [G.], his executors or administrators, shall be used by virtue of the power in that behalf hereinbefore contained, or in pursuance of any power to be given to the said [P.], his executors, ad-

to pay the partnership debts, and to indemnify [G.], &c.

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these presents *doth* grant, &c. unto the said [G.], his executors, administrators, and assigns, ALL the four seventh parts, or other the share and proportion of him the said [P.], of and in all and singular the credits comprised in the said schedule hereunder written; *And* all the right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said [P.] of and in the same share and premises respectively; TO HAVE, receive, take, and enjoy the same unto the said [G.], his executors, administrators, and assigns, to and for his and their use and benefit, and as and for his and their property and effects absolutely for ever. *(Add power of attorney and covenants by [P.] in regard to the credits assigned by him, similar to those which are antecedently given and entered into by [G.] in regard to the credits and effects assigned by him. Also a covenant by [G.] to indemnify [P.] against the costs of any action or suit which shall be brought by [G.] in his ([P.'s]) name in respect of the scheduled credits.)*"

Habendum to [G.], &c.

DISSOLUTION OF PARTNERSHIP BETWEEN TWO.

Further *testatum.*

Mutual releases.

ministrators, or assigns, by virtue of these presents (*k*): AND THIS INDENTURE LASTLY WITNESSETH, that, in consideration of the premises, each of them the said [P.] and [G.], for himself, his heirs, executors, and administrators, doth hereby remise, release, and for ever quit claim unto the other of them, his heirs, executors, administrators, and assigns, all actions, suits, accounts, reckonings, claims, and demands whatsoever, at law or in equity, which either of them the said parties, his heirs, executors, or administrators, now hath, or hereafter may have, claim, challenge, or demand against the other of them, his heirs, executors, administrators, or assigns, for or by reason of the hereinbefore mentioned indenture of partnership, or any clause, covenant, agreement, matter, or thing therein contained, or by reason of any other matter or thing whatsoever touching or concerning the said joint trade or partnership; subject, and without prejudice, nevertheless, to the covenants and agreements herein contained. IN WITNESS, &c.

(*k*) It may be proper, in some cases, to make the following addition to the covenant:

Vouchers shewing the payment of debts to be produced.

"And that he the said [P.], his executors or administrators, will, within the period of twelve calendar months from the date hereof, produce to the said [G.], his executors or administrators, receipts and vouchers, shewing the payment of all and singular the debts and sums of money owing by the said partnership, hereby covenanted to be paid by the said [P.] as aforesaid."

DEED *of* DISSOLUTION *of* PARTNERSHIP *(carried on without Articles) between* THREE, *one of whom* RETIRES, *receiving a Sum of Money* (*a*), *(secured by the Promissory Notes of the continuing Partners), and executing an* ASSIGNMENT *of his* SHARE *of the* JOINT PROPERTY *to the other two.*

DISSOLUTION BETWEEN THREE, WITHOUT ARTICLES.

THIS INDENTURE, made the —— day of ——, BETWEEN [A.], of the one part; and [B.] and [C.], of the

Parties.

(*a*) Where two persons dissolve partnership†, and one of them assigns to the other his share in the partnership credits, in consideration of a sum of money paid by the latter, the deed is not liable to the *ad valorem* duty on purchases.

No *ad valorem* duty payable on an assignment of credits.

Thus, in the late case of *Belcher* v. *Sikes*, 6 Barn. & Cress. 234, A. and B., who were partners in certain contracts with the commissioners for victualling the navy, by indenture agreed to dissolve the partnership, and that A.'s share in the monies, property, and effects of the partnership should be estimated at 50,000*l.*, and should be taken by B. at that sum, and that B. should have the benefit of the contracts, and should carry on the business on his own account. A. then, in consideration of 50,000*l.*, which was recited to have been paid or secured by B., assigned to B. all his (A.'s) share in the debts and sums of money owing to them by virtue of the contracts, and all bonds, bills, and notes relating to the same, and of and in all other the monies, goods, chattels, and effects of the partnership. This instrument bore a common deed stamp only; and it was contended that it required an *ad valorem* stamp on the 50,000*l.*, the transaction being a purchase at that sum: but the Court held, that the stamp was sufficient, inasmuch "as the subject-matter of the contract was not *property* within the intent of the statute."

The Court, in this case, grounded its decision on the case of *Warren* v. *Howe*, 2 Barn & Cress. 281, (noticed *ante*, Vol. 6, p. 160), where an

Suggestion as to stamp duty.

† Of course, it is not intended to confine this proposition to the case of *two* partners. It is often more convenient, in stating a rule, to adopt a definite number, though the principle is applicable to any other number.

DISSOLUTION BETWEEN THREE, WITHOUT ARTICLES.

Recital of partnership.

other part: WHEREAS the above-named [B.] and [C.], having for some time past carried on the trade or business of —— in —— aforesaid, for their joint benefit, as copartners, did, on or about the —— day of ——, mutually agree to admit the said [A.] as a copartner with them in their said trade or business; in consideration whereof the said [A.] agreed to pay, and did accordingly pay, to the said [B.] and [C.] the sum of £——, and upon such payment thereof by the said [A.], it was agreed that the said sum of £—— should make up and constitute one full and equal third part of the capital or joint stock to be used or employed in the said trade or business; And that the said [A.] should be interested in and entitled to one equal third part or share of and in such capital or joint stock, and the profits thereof, and should pay and sustain one full and equal third part of all debts and losses incident to the said trade or business, from the —— day of —— now last past; And the said [B.], [C.,] and [A.], have, in pursuance of such agreement, accordingly carried on the said *trade or business for their joint and equal benefit as copartners as aforesaid, from and since the —— day of —— last past, under the firm of [B.], [C.] and

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assignment of a judgment debt was held not to require an *ad valorem* stamp, as it did not fall under the denomination of "property" within the meaning of the stamp act, which must be intended to import such property as is usually the subject of sale, which the Court thought a judgment was not. The principle of this decision seems applicable to all transfers of *choses en action;* but it is observable, that in *Belcher* v. *Sikes* the assignment was not confined to the assignor's share in the partnership credits, but extended to his share in the other joint effects. The editor, however, has understood that there were no other effects, and the reasoning of the Court evidently applies only to such a case, being founded solely on the nature of the subject, as consisting of *choses en action*, and not on the nature of the transaction, as being between partners on a dissolution. It would be unsafe, therefore, to consider the case as an authority for the exemption, when the assignment operates upon other property transferred jointly with the credits for one entire consideration, in which case it is clear, that the *ad valorem* duty, if payable in respect of any part of the consideration-money, must apply to the whole. In order to exempt the assignment of the credits, the consideration money should be apportioned. The next precedent has been framed with a view to this object.

Co.; but no articles or deed of copartnership have or hath been executed by the said parties; AND WHEREAS the said [B.], [C.], and [A.], have mutually agreed to dissolve the said copartnership now subsisting between them as aforesaid, so far as relates to the said [A.]; And the said parties have further mutually agreed, that, on the dissolution of the said copartnership, the said [B.] and [C.] (who intend by themselves to carry on the said trade) shall have for their own use and benefit all the third part or share, and other right and interest of the said [A.], of, in, and to all the goods, wares, and merchandizes, ready monies, stock in trade, credits (*b*), and all other effects, matters, and things belonging or owing to the said parties as copartners and joint traders as aforesaid; In consideration whereof they the said [B.] and [C.] have agreed to pay or allow for the same to the said [A.] the said sum of £—— so paid or brought by him into the said trade or business as aforesaid; And also the further sum of £——, as and for the third part or share of the said [A.] of and in the profits of the said joint trade, from the commencement of the said copartnership, over and besides the sum of £——, which he the said [A.] hath, since such commencement, received or taken out of the said joint stock for his own separate use and benefit; And the said [B.] and [C.] have also agreed to indemnify the said [A.] against the debts now due or owing from the said copartnership in such manner as is hereinafter mentioned: NOW THEREFORE THIS INDENTURE WITNESSETH, that, in pursuance and part performance of the hereinbefore recited agreements, and in consideration of the premises, they the said [B.], [C.], and [A.] (by and with the mutual assent and consent of each of them), *have*, and each of them **hath*, dissolved and determined, and by these presents *do*, and each of them *doth*, fully and absolutely dissolve and determine the said copartnership and joint trade now subsisting between them the said [B.], [C.], and [A.], and every matter or thing whatsoever in anywise relating thereto;

DISSOLUTION BETWEEN THREE, WITHOUT ARTICLES. —Of agreement to dissolve the partnership. —And of the terms of the intended dissolution.

Testatum.

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The parties respectively declare the partnership to be dissolved.

(*b*) In this, and most of the other precedents, the word "debts" was used to designate as well the sums owing *to* as those owing *by* the partnership. For the sake of distinction and accuracy, however, the former word has been changed to "credits."

DISSOLUTION BETWEEN THREE, WITHOUT ARTICLES.

[And each of them the said parties doth hereby declare and agree that such copartnership and joint trading shall from henceforth cease, determine, and be utterly void, as fully and effectually, to all intents and purposes whatsoever, as if the same had never been entered into by or between them the said [B.], [C.], and [A.] (*c*)]: AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance and further performance of the hereinbefore mentioned agreements, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland, (being the said sum of £—— so brought in by the said [A.] as aforesaid, together with the sum of £—— agreed to be paid to him for or in respect of the profits of the said joint trade or business), to the said [A.], in hand, at or before the sealing and delivery of these presents, paid, or to the satisfaction of the said [A.] secured to be paid to him by the said [B.] and [C.] by three several promissory notes, under their hands, and respectively bearing even date with these presents, for the payment of the sum of £—— each (making together the said aggregate sum of £——), the first of such promissory notes becoming due at the expiration of two calendar months, the second at the expiration of four calendar months, and the third at the expiration of six calendar months next after the date of these presents, the receipt of which said three several promissory notes he the said [A.] doth hereby acknowledge, and doth accept the same in full for the absolute purchase of all the part, share, right, and interest intended to be hereby assigned of him the said [A.], of, in, and to the said copartnership stock, and the profits thereof, he the said [A.] *hath* bargained, sold, assigned, and transferred, and by these presents *doth* bargain, &c. unto the said [B.] and [C.], *their executors, administrators, and assigns, ALL THAT the one full and equal undivided third part or share, and all other the part, share, right, and interest of him the said [A], of, in, and to all and every the goods, wares, merchandizes, ready monies, stock in trade, and all other the effects, property, matters, and things whatsoever which belong or appertain to the said joint trade or copart-

Further *testatum*.

In consideration of certain promissory notes given by the continuing partners, the retiring partner assigns to them his share in the partnership property.

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(*c*) This clause may properly be omitted.

nership, or to them the said parties hereto, by virtue thereof, or in anywise howsoever touching or concerning the said copartnership or joint trade, and also of, in, and to all and every such credits and sum and sums of money as are now outstanding, due or owing to them the said parties hereto on account of their said copartnership or joint trade; AND *also* all the right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said [A.], by virtue of or under the said copartnership, or otherwise, of, in, to, or out of all the stock in trade, credits, effects, matters, and things whatsoever, due, owing, or belonging to them the said parties hereto as copartners as aforesaid, or to the said joint trade on account thereof in anywise howsoever; TO HAVE, receive, take, and enjoy the said undivided third part or share, and all other the premises hereinbefore mentioned to be hereby assigned, or intended so to be, unto and by the said [B.] and [C], their executors, administrators, and assigns, for their own absolute use and benefit, and as their own proper goods, chattels, and effects, for ever; absolutely discharged from any lien or claim in respect of the three several promissory notes hereinbefore mentioned, or any of them; And, for the considerations aforesaid, the said [A.] doth, by these presents, make, constitute, and appoint the said [B.] and [C.], their executors, administrators, and assigns, his true, lawful, and irrevocable attornies, in the joint names of the said [B.], [C.], and [A.], or otherwise, to ask, demand, and receive to and for their own use and benefit from all persons whom it may concern, the part or share of him the said [A.] hereby assigned, or intended so to be, of and in all and every or any of the credits, estate, or effects owing or belonging to the said copartnership; And in case of non-payment or non-delivery thereof, or any part thereof, then, at the costs of the said [B.] and [C.], or either of them, their or either of their executors *or administrators, to commence or bring and prosecute any action or actions, or suit or suits, either at law or in equity, for the recovery thereof, and upon receipt or delivery thereof, or of any part thereof, to give proper discharges for the same, and from time to time to appoint a substitute or substitutes for all or any of the purposes afore-

DISSOLUTION BETWEEN THREE, WITHOUT ARTICLES.

Habendum.

Letter of attorney.

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DISSOLUTION BETWEEN THREE, WITHOUT ARTICLES.

said, and generally to do and execute all such further acts and things as shall be necessary for deriving the full benefit of the assignment hereby made, he the said [A.] hereby ratifying, and confirming, and agreeing to ratify and confirm all and whatsoever the said attorney or attornies, or his or their substitute or substitutes, shall lawfully do, or cause to be done, in the premises; And the said [A.], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [B.] and [C.], their executors, administrators, and assigns, in manner following, (that is to say); that he the said [A.] hath not at any time heretofore done or executed, or suffered to be done or executed, any act, matter, or thing whatsoever, by means whereof his share or interest in the said stock in trade, credits, and effects, belonging, due, or owing to the said copartnership, or any of them, or any part thereof, is charged, released, incumbered, or prejudicially affected in anywise howsoever; *And also*, that he the said [A.], his executors, or administrators, shall not nor will at any time hereafter, by himself or themselves, or any agent or agents, receive or take into his or their possession any of the same stock in trade, credits, and effects, or any part thereof, nor release, give up, or discharge the same, or any suit or action to be brought or commenced for the recovery thereof, without the direction, in writing, of the said [B.] and [C.], or the survivor of them, his executors or administrators, for that purpose, nor do, or suffer to be done, any act or thing whatsoever, by means whereof they the said [B.] and [C.], their executors, administrators, or assigns, or any of them, shall or may be hindered and obstructed from receiving, recovering, and getting in all or any of the said stock in trade, credits, effects, and premises, whereof the share and interest of him the said [A.] is hereby assigned, or intended so to be, nor shall or will revoke or make void the power or authority hereby to them granted for that purpose; *but that, on the contrary, he the said [A.], his executors or administrators, shall and will, at any time or times hereafter, on the request and at the costs of the said [B.] and [C.], or the survivor of them, his executors or administrators, make and execute all such further lawful acts, deeds, matters, and things whatsoever, as well

Covenant by assigning partner that he has done no act by which his share can be incumbered.

Also not to receive any of the credits, or release actions, &c. to be brought by the assignee partners.

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DISSOLUTION BETWEEN THREE, WITHOUT ARTICLES.

for corroborating these presents, and the powers and authorities hereby given, as for the more effectually assigning all and singular the said hereby assigned premises unto the said [B.] and [C.], their executors, administrators, and assigns, as by them, or any of them, or their or any of their counsel, shall be reasonably required; AND, in further pursuance and performance of the hereinbefore recited agreements, and in consideration of the premises, they the said [B.] and [C.] do, for themselves jointly, their heirs, executors, and administrators, and each of them doth, for himself severally, his heirs, executors, and administrators, hereby covenant and agree with the said [A.], his executors and administrators, that they the said [B.] and [C.], or one of them, or the heirs, executors, or administrators of one of them, shall and will, within a reasonable time after the sealing and delivery of these presents, pay or cause to be paid and satisfied, all and every the debts, sum and sums of money, which are now justly owing by or from them the said [B.], [C.], and [A.], as copartners as aforesaid, unto any person or persons whomsoever, for or on account of, or in respect of the said copartnership, from the commencement of the same; and shall and will, at all times hereafter, effectually save harmless and keep indemnified him the said [A.], his heirs, executors, and administrators, and his and their lands, tenements, goods, and chattels, from and against such debts, sum and sums of money as last aforesaid, and all costs, charges, damages, and expenses attending the nonpayment of the same, or any of them; and also of and from all [such] costs, charges, and damages [as he the said [A.], his executors or administrators, shall or may pay or sustain (*e*)], by reason of his or their name *or names being made use of in any action or suit to be brought or commenced by virtue of the power or authority hereinbefore given to them the said [B.] and [C.], their executors or administrators, for that purpose or otherwise: AND THIS INDENTURE LASTLY WITNESSETH, that, in further pursuance and performance of the hereinbefore recited

Joint and several covenant by continuing partners to pay the debts of the partnership.

And to indemnify the retiring partner therefrom.

And also from all costs in consequence of his name being made use of.

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Further *testatum*.

(*e*) As this is a covenant to save harmless and not to reimburse, the words in brackets, though usually added, appear to be incorrect.

DISSOLUTION BETWEEN THREE, WITHOUT ARTICLES.
Mutual release.

agreement, and in consideration of the premises, each of them the said [B.] and [C.] *hath* remised, released, and quit claimed, and by these presents *doth* remise, release, and quit claim unto the said [A.], his heirs, executors, and administrators; and he the said [A.] *hath* remised, released, and quit claimed, and by these presents *doth* remise, release, and quit claim unto the said [B.] and [C.], and each of them, their and each of their heirs, executors, and administrators (*f*), (but subject and without prejudice to the covenants contained in these presents), all and all manner of actions, suits, causes of action and suit, controversies, reckonings, sum and sums of money, claims, and demands whatsoever, both at law and in equity, which they the said releasing parties respectively, or either of them, or their or his executors or administrators, now claim or claims, or have or hath, or hereafter can, shall, or may claim or have, against the others or other of them, their or his executors or administrators, by reason or on account of the said recited copartnership, or by reason or on account of any other matter, cause, or thing whatsoever in anywise relating thereto, from the beginning of the world unto the day of the date of these presents. IN WITNESS, &c.

(*f*) In the draught from which this precedent was taken, each of the partners released to the other and others; but it is obvious that this was incorrect, as no release was intended to be given between B. and C., the continuing partners.

DEED *of* DISSOLUTION *of* PARTNERSHIP *between* BANKERS, *and* ASSIGNMENT *of all the Partnership Effects to two Strangers* (*a*), *with* GENERAL RELEASE, *and an Indemnity against the Claims of* [*R. S.*] *(a former Partner).*

DISSOLUTION OF BANKING PARTNERSHIP.

THIS INDENTURE, made the —— day of ——, BETWEEN [A.], of &c., [B.], of &c., [C.], of &c., and [D.], of &c., of the one part; and [E.], of &c., and [F.], of &c., of the other part: WHEREAS *(recite articles of partnership and agreement to dissolve the partnership)*: AND WHEREAS the said [E.] and [F.] have contracted with the said [A.], [B.], [C.], and [D.], for the absolute purchase of all and singular the credits and sums of money owing to them as such partners as aforesaid, at the price or sum of £—— (*b*), and in consideration of the said [E.] and [F.] agreeing to take upon themselves the debts owing by the said partnership, and to indemnify the said [A.], [B.], [C.], and [D.], therefrom as hereinafter expressed: AND WHEREAS the said [E.] and [F.] have also contracted with the said [A.], [B.], [C.], and [D.] for the absolute purchase of the leasehold messuage in ——, in which their partnership banking business has been carried on, and all other the goods, chattels, and effects of the said partnership, at or for the price or sum of £——: NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, they the said [A.], [B.], [C.], and [D.], by

Parties.

Recital of contract for purchase of credits.

—Also of leasehold messuage and other effects.

Testatum. [A.], [B.], [C.], and [D.] dissolve their partnership.

(*a*) In general, it would be convenient, in such a case as this, to make the assignment by a separate deed.

(*b*) A much larger sum was in this case paid for the credits than the rest of the property, and, in order to prevent the *ad valorem* duty from attaching to the consideration money for the whole, an apportionment was made, agreeably to a suggestion *ante*, p. 309.

DISSOLUTION OF BANKING PARTNERSHIP.

mutual consent, do, by these presents, dissolve and determine the said partnership so entered into by them as bankers in —— as aforesaid, and do hereby declare and agree that the same partnership shall be considered as having ceased to all intents whatsoever, upon or from the —— day of —— last. *And* each of them the said [A.], [B.], [C.], and [D.], doth hereby for himself, his heirs, executors, and administrators, release, acquit, and for ever discharge the others and every other of them, their and his heirs, executors, and administrators, of and from all actions, suits, causes of action and suit, debts, [accounts, reckonings, controversies, sum and sums of money, damages, costs, charges], claims and demands whatsoever, at law and in equity, which any or either of them the said [A.], [B.], [C.], and [D.] now have or hath, or ever had, or which any or either of them, or the executors or administrators of any or either of them, can, shall, or may, or otherwise might hereafter have, claim, or demand against, from, or upon the others, or any other of them, their or his heirs, executors, or administrators, by reason or on account of the said partnership, or of any transaction or thing whatsoever in anywise concerning the same.

Each partner releases the other from all actions, &c.

Further *testatum.*

AND THIS INDENTURE ALSO WITNESSETH, that in consideration of the sum of £—— of lawful money of Great Britain and Ireland paid by the said [E.] and [F.] to the said [A.], [B.], [C.], and [D.], at or immediately before the execution of these presents, the receipt whereof they the said [A.], [B.], [C.], and [D.] hereby respectively acknowledge, and from the payment thereof discharge the said [E.] and [F.], and each of them, their and each of their executors and administrators, they the said [A.], [B.], [C.], and [D.] *have*, and every of them *hath*, granted, sold, assigned, and transferred, and by these presents *do*, and every of them *doth*, grant, sell, assign, and transfer unto the said [E.] and [F.], their executors, administrators, and assigns, all and singular the credits and sums of money whatsoever now due or owing to the said [A.], [B.], [C.], and [D.] as such partners as aforesaid; and all bonds, bills, notes, securities, books of account, letters, papers, and writings whatsoever, for or relating to the same credits and sums of money, or any of *them; And all the right, title, interest, claim, and demand whatsoever, at law and in equity, of

Assignment of credits.

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them the said [A.], [B.], [C.], and [D.] respectively, in and to the said hereinbefore assigned premises: To HAVE AND RECEIVE the said credits, sums of money, and premises hereinbefore assigned, or intended so to be, unto and by the said [E.] and [F.], their executors, administrators, and assigns, for their own proper use and benefit absolutely. (*Add letter of attorney to receive debts, bring actions, &c., ut ante*, p. 314): AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the further sum of £—— of lawful money aforesaid paid by the said [E.] and [F.] to the said [A.], [B.], [C.], and [D.], at or immediately before the execution of these presents, the receipt &c. (*ut ante*, p. 317), they the said [A.], [B.], [C.], and [D.] *have*, and every of them *hath*, bargained, sold, assigned, and transferred, and by these presents *do*, and every of them *doth*, bargain, &c. unto the said [E.] and [F.], their executors, administrators, and assigns; First, *All that* the said leasehold messuage or dwelling-house numbered —— in ——, London, wherein the banking business was, down to the day of the date of these presents, carried on by the said [A.], [B.], [C.], and [D.], in partnership as aforesaid, with the offices and appurtenances thereto belonging; Secondly, all and singular other the monies, goods, chattels, stock in trade, estate, and effects whatsoever and wheresoever, now of or belonging to them the said [A.], [B.], [C.], and [D.] as such partners respectively in the said banking business as aforesaid; *And all* the estate, right, title, interest, property, claim, and demand whatsoever, at law and in equity, of them the said [A.], [B.], [C.], and [D.] respectively, in, to, or out of the said hereby assigned premises; To HAVE AND TO HOLD the said leasehold messuage or dwelling-house, with the offices and appurtenances thereunto belonging, unto the said [E.] and [F.], their executors, administrators, and assigns, henceforth during all the residue now unexpired of the term of —— years, granted by the hereinbefore mentioned indenture of lease, and for all other the estate, term, and interest of the said [A.], [B.], [C.], and [D.] respectively therein, subject to the payment of the rent and to the performance of the covenants on the lessees' part by and in *the lease thereof reserved and contained; AND TO HAVE, TAKE, AND RECEIVE the said

Further *testatum*.

Assignment of leasehold messuage in ——.

And all the other effects, &c.

And all the right, title, &c.

Habendum as to leasehold messuage, &c.

under the rents and covenants.

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Habendum as to

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other effects.

monies, goods, chattels, stock in trade, and all other the premises secondly hereinbefore assigned unto and by the said [E.] and [F.], their executors, administrators, and assigns, for their own proper and absolute use and benefit; AND the said [A.], [B.], [C.], and [D.], for themselves respectively, and for their respective heirs, executors, and administrators, (and not any of them for the others or other of them, or for the heirs, executors, or administrators, acts or deeds of the others or other of them), do hereby covenant with the said [E.] and [F.], their executors, administrators, and assigns, in manner following, (that is to say); that they the said [A.], [B.], [C.], and [D.], or any or either of them, have not nor hath, at any time heretofore, done, committed, or executed, or willingly permitted, any act, matter, or thing whatsoever, by means whereof the said premises hereinbefore expressed to be hereby assigned, or any part thereof respectively, are or is, can, shall, or may be charged, prejudiced, or incumbered in anywise howsoever, except as appears by the regular entries made in the books of the said partnership; *And also*, that they the said [A.], [B.], [C.], and [D.], or any of them, their or any of their executors or administrators, shall not nor will at any time hereafter receive, release, or discharge the said credits and monies hereinbefore expressed to be hereby assigned, or any of them, or any part thereof, nor disallow, discontinue, release, or discharge any action, suit, judgment, or execution to be brought or obtained by them the said [E.] and [F.], their executors, administrators, or assigns, for the same, or any of them, or any part thereof, without the consent, in writing, of them the said [E.] and [F.], their executors, administrators, or assigns, or the rule, order, or decree of some Court of law or equity. *And* the said [E.] and [F.], for themselves and their heirs, executors, and administrators, do hereby jointly and severally covenant with the said [A.], [B.], [C.], and [D.], and every of them, and with their and every of their executors and administrators, that they the said [E.] and [F.], or one of them, their or one of their heirs, executors, or administrators, shall and will, within three calendar months from the day *of the date of these presents, well and truly pay off and discharge all and singular the debts now owing from, and all and singular the contracts

Several covenants by the assignors that they have not incumbered, &c.

except as appears by the partnership books.

That they will not receive, release, or discharge any of the credits hereby assigned,

nor discontinue any action, &c. without assignees' consent, or the rule, order, or decree of some Court of law or equity.

Joint and several covenants by assignees.

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to pay the partnership debts, and perform

and engagements which have been entered into by the said [A.], [B.], [C.], and [D.], as such partners in the said banking business as aforesaid, and which have been duly and regularly entered in the books (*b*) of the said partnership, except as to such debts, contracts, and engagements as shall not become due or are not to be performed until after the expiration of the said three calendar months from the date hereof; and shall and do pay and perform such last-mentioned debts, contracts, and engagements within one calendar month after the same shall become due or ought to be performed; *And* shall and will, from time to time, and at all times hereafter, effectually save harmless and keep indemnified them the said [A.], [B.], [C.], and [D.], and every of them, their and every of their heirs, executors, and administrators, and their and every of their lands and tenements, goods and chattels, from and against all and singular the said debts, contracts, and engagements, and also from and against all costs, charges, damages, losses, and expenses, claims, and demands, by reason of the same several debts, contracts, and engagements, or any of them, or of any act, matter, or thing whatsoever in anywise relating thereto; AND ALSO, that from time to time when thereunto requested, they the said [E.] and [F.], or one of them, their or one of their executors or administrators, shall or will produce, or cause to be produced, to the said [A.], [B.], [C.], and [D.], or any or either of them, their or any or either of their heirs, executors, or administrators, or to any person or persons whom they or he shall appoint, all vouchers and other papers which do or shall relate to or concern the payment of the same debts, and the performance of the same contracts and engagements, and *every or any of them, and also permit the same vouchers and other papers to be used in such manner as from time to time shall be necessary for the purpose of enabling the said

DISSOLUTION OF BANKING PARTNERSHIP.

contracts within three calendar months, or within one calendar month after the same become due, &c.

And indemnify the assignors from the same debts and contracts.

Also to produce all vouchers as to payment of debts and performance of contracts.

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To enable as-

(*b*) For greater definiteness, it may sometimes be proper to enumerate the debts in a schedule, where they are not v y numerous, in which case add, instead of the words in the text, " and which have been duly and regularly entered in the books of the said partnership"—

" which are specified in the schedule hereunder written."

Variation where debts are scheduled.

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[A.], [B.], [C.], and [D.] respectively, or any or either of them, their or any or either of their heirs, executors, or administrators, to discharge himself or themselves of and from the payment and performance of the same debts, contracts, and engagements respectively; And the said [A.] and [C.], for themselves, and their heirs, executors, and administrators, do hereby jointly and severally covenant with the said [E.] and [F.], their heirs, executors, and administrators, that they the said [A.] and [C.], or one of them, their or one of their heirs, executors, or administrators, shall and will from time to time, and at all times hereafter, well and effectually save harmless and keep indemnified them the said [E.] and [F.], and each of them, their and each of their heirs, executors, administrators, and assigns, from and against all actions, suits, claims, and demands whatsoever, which shall or may be at any time or times hereafter brought or prosecuted, or be made by the said [R.], his executors or administrators, against or upon them the said [E.] and [F.], or either of them, their or either of their heirs, executors, administrators, or assigns, for, or in respect, or on account of the share or shares, if any, of the said [R.], of and in the said partnership stock and effects hereby expressed to be assigned as aforesaid, or any part thereof, or the gains and profits arisen therefrom, or any part thereof; and also from and against all losses, damages, costs, charges, and expenses whatsoever, by reason of any such actions, suits, claims, and demands, by or from the said [R.], his executors, or administrators, as aforesaid. In witness, &c.

signors respectively to discharge themselves therefrom.

Joint and several covenant by assignors to indemnify assignees from all claims by [R.], a late partner.

And against all losses, &c. by reason of any such actions, &c.

ASSIGNMENT *by* ADMINISTRATOR *of* DECEASED PARTNER *of* STOCK IN TRADE *of the old Partnership to the* SURVIVING PARTNER. DISSOLUTION *of Partnership formed between the* SURVIVING PARTNER *and the* WIDOW *of the* DECEASED PARTNER *since his Death.* ASSIGNMENT *by the Widow (retiring Partner) of* HER SHARE *of the* STOCK. COVENANT *by Assignee-Partner to pay Debts and deliver Duplicates of Discharges to the retiring Partner.* COVENANT *by* RETIRING PARTNER NOT TO CARRY ON THE SAME TRADE, *&c.*

ASSIGNMENT BY ADMINISTRATOR, AND DISSOLUTION OF PARTNERSHIP FORMED WITH THE WIDOW.

THIS INDENTURE, made the —— day of ——, BETWEEN [A.] (widow and relict of [B.], of ——, deceased), of the first part; [C.] (administrator of the goods, chattels, and credits of the said [B.], deceased), of the second part; and [D.], of ——, of the third part: WHEREAS the said [B.], deceased, and [D.], for many years previously to and up to the time of the decease of the said [B.], carried on the business or trade of —— in copartnership together: AND WHEREAS the said [B.] departed this life some time on or about the —— day of ——, ——, intestate, and thereupon letters of administration of his goods, chattels, and credits were granted to the said [C.] by the proper ecclesiastical court, she the said [A.] having duly renounced the administration thereof: AND WHEREAS the said stock in trade, plant, and fixtures, used by the said [B.], deceased, and [D.], for the purpose of carrying on the said joint trade were wholly provided by and were the exclusive property of him the said [B.]; and soon after the decease of the said [B.] the same stock, plant, and fixtures were duly valued and appraised, and thereupon the said [D.] became the purchaser thereof at *or for the price or sum of £——, which said sum of £—— the said [D.] hath duly paid to the said [C.] as the administrator of the said [B.], as the

Parties.

Recital of partnership.

Of death and intestacy of partner, and administration being taken out to his effects.

That the stock, &c. belonged to the deceased partner, and had been sold by his administrator to the surviving partner;

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said [C.] doth hereby acknowledge; but no assignment hath hitherto been executed unto the said [D.] of the said stock, plant, and fixtures so by him purchased as aforesaid: AND WHEREAS, since the death of the said [B.], the said [A.], his widow, hath carried on the said trade or business of ——, in copartnership with the said [D.], upon or with the said stock, plant, and fixtures so purchased by him the said [D.] as aforesaid; and during the course of their said copartnership they have acquired some additional stock in trade, and divers sums of money are owing to them for or in respect of their said copartnership: AND WHEREAS no distribution or division hath hitherto been made between the said [D.] and [A.] of the gains and profits of the said joint trade so carried on by them since the decease of the said [B.] but the said [D.] hath at different times advanced unto the said [A.] several sums of money, amounting in the whole to the sum of £——, as the said [A.] doth hereby acknowledge: AND WHEREAS the said [A.] and [D.] have mutually agreed to dissolve the said copartnership so carried on by them since the death of the said [B.] as aforesaid, and upon the treaty for such dissolution it was agreed, that, in consideration of the sum of £—— so advanced and paid to her the said [A.] as aforesaid, and of the further sum of £——, to be secured to be paid to the said [A.] by the bond of the said [D.] in a sufficient penalty, at the times hereinafter mentioned, she the said [A.] should assign, release, and make over unto him the said [D.] all and singular her part and share, right and interest, as well of and in the stock in trade, plant, fixtures, and things mentioned in the schedule hereunder written, as also of and in the stock and effects in trade, credits, and sums of money now belonging or owing to them the said [A.] and [D.], for or in respect of the said joint trade or business so by them carried on since the decease of the said [B.] as aforesaid; and also, that she the said [A.] should enter into such covenants as are hereinafter contained, restraining her from carrying on the aforesaid trade or business in manner hereinafter *expressed: AND WHEREAS, in pursuance of the said agreement on the part of the said [D.], he the said [D.], by his certain bond *(recite bond)*: AND WHEREAS the said [C.], upon the application of the said [D.], hath consented, so far as he law-

but no assignment had been made.

Recital of partnership carried on by surviving partner with the widow of the deceased.

That no division of profits had been made.

Of agreement to dissolve the partnership.

Terms of dissolution.

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Agreement by administrator to make assignment.

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fully may or can, without rendering himself liable to or responsible for any of the covenants and agreements hereby entered into between them the said [A.] and [D.], to concur in and be a party to these presents, for the purpose of assigning unto him the said [D.] the said stock, plant, and fixtures so by him purchased as aforesaid, and of entering into the covenants hereinafter contained as to his own acts and deeds, but no further or otherwise: NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, and particularly in consideration of the said sum of £—— so heretofore paid by the said [D.] to the said [C.] as aforesaid, the receipt &c., he the said [C.] *Hath* bargained, sold, assigned, and set over, and by these presents *Doth*, &c., [and in consideration of the said sum of £—— and interest, so secured to the said [A.] by the said [D.] as aforesaid, she the said [A.] *Hath* remised, released, and assigned, and by these presents *Doth*, &c. unto the said [D.], his executors, administrators, and assigns (*a*)], ALL AND SINGULAR the said stock, plant, fixtures, and things belonging to and being in or used by the said copartnership trade or joint concern heretofore carried on by them the said [B.] and [D.] previously to the decease of the said [B.], and particularized in the schedule hereunder written; AND all the [estate (*b*)], right, title, interest, claim, and demand whatsoever, both at law and in equity, of the said [C.] [and [A.] respectively], of, in, and to the said premises, or any part thereof; TO HAVE, RECEIVE, take, and enjoy the said stock, plant, fixtures, and things hereby assigned, or intended so to be, unto the said [D.], his executors, *administrators, and assigns, to and for his and their own use and benefit, and as and for his and their own proper goods and chattels, henceforth absolutely for ever. AND the said [C.] doth hereby for himself, his heirs, executors, and administrators, covenant and declare with and

Testatum. Administrator of deceased partner assigns to surviving partner the stock in trade, &c.

Habendum.

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Covenant by administrator that he has not incumbered.

(*a*) As A. had renounced administration of the effects of her husband, and could, therefore, have no claim in a representative character, and as she afterwards assigns all her interest in the partnership carried on by her since the decease of B., the necessity of her joining in this assignment is not very apparent. The draft was prepared by a gentleman of eminence.

(*b*) This word is improper in an assignment of personal chattels.

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to the said [D.], his executors, administrators, and assigns, that he the said [C.] hath not at any time heretofore made, done, executed, or willingly or knowingly suffered any act, matter, or thing whatsoever, by means whereof the said stock, plant, fixtures, and things by him assigned as aforesaid, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, or incumbered in anywise.

Further *testatum*. The widow and surviving partner declare the partnership carried on by them since the decease of the husband to be dissolved.

AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, and in pursuance of the aforesaid agreement, they the said [A.] and [D.] [with the mutual assent and consent of each other, have determined and dissolved, and (*c*)] by these presents do determine and dissolve the said copartnership and joint trade so by them carried on since the decease of the said [B.] as aforesaid, and do hereby declare and agree that the same shall, from the —— day of —— now last past, be deemed to have ceased and determined to all intents and purposes, [as fully and effectually as if the same had never been entered into]: AND *it is hereby agreed and declared* between and by the said [A.] and [D.] that a notice or advertisement in the words or to the effect following (that is to say), *(copy advertisement)*, shall forthwith be inserted and published at the expense of the said [D.] in the London Gazette, and such other newspapers as the said [D.] shall think proper; and also that a circular letter, signed by them the said [A.] and [D.], shall forthwith be sent by the said [D.] to each of the present customers of the said copartnership, or to such of the said customers as he shall think proper, which said circular letter shall be in the words or to the effect following (that is to say), *(copy circular letter)*.

Agreement that notice and advertisement of dissolution shall be signed.

Further *testatum*.

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AND THIS INDENTURE FURTHER *WITNESSETH, that, in further pursuance of the said recited agreement on the part of the said [A.], and in consideration of the said sum of £—— so heretofore paid by the said [D.] to the said [A.], and also in consideration of the said further sum of £—— so secured to be paid to the said [A.] by the said recited bond or obligation of the said [D.] as aforesaid, and also in consideration of ten shillings to the said

(*c*) The words in brackets throughout the precedent may properly be dispensed with.

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[A.] paid by the said [D.] at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, she the said [A.] *Hath* granted, bargained, sold, assigned, and set over, and by these presents *Doth*, &c. unto the said [D.], his executors, administrators, and assigns, all the part and share of her the said [A.] of, in, and to all and every the ready money, goods, stock, and effects whatsoever belonging to the said joint trade and copartnership so carried on by them the said [A.] and [D.] since the decease of the said [B.] as aforesaid, or to them the said [A.] and [D.], or either of them, in respect of the same copartnership trade, and also of and in all credits and sums of money now or at the dissolution of the said copartnership trade due and owing to the same copartnership trade or joint concern, or to them the said [A.] and [D.] jointly, or either of them severally in respect of the said joint trade or copartnership; AND all the right, title, interest, benefit, claim, and demand whatsoever, both at law and in equity, of her the said [A.] of, in, and to all and every the said credits and sums of money, and all and singular bonds, bills, notes, specialties, and books for and concerning the said credits and the said copartnership between the said [A.] and [D.]; TO HAVE, RECEIVE, and enjoy [the said ready monies, goods, stock, and effects, credits, and sums of money, together with the bonds, bills, notes, specialties, and books concerning such credits, and other] the premises lastly hereby assigned unto and by the said [D.], his executors, administrators, and assigns, to and for his and their own use and benefit, [and as and for his and their own proper goods and chattels henceforth for ever]. And [for the considerations and to the intent aforesaid], she the said [A.] *Hath* made, constituted, and appointed, and by these presents *Doth*, &c., the said [D.], his executors, administrators, *and assigns, the true and lawful attorney and attornies irrevocable of her the said [A.], in her name, or in the joint names of them the said [A.] and [D.], or otherwise, but for the sole use and benefit, and at the sole risk, costs, and charges of him the said [D.], his executors, administrators, and assigns, to ask, demand, sue for, recover, and receive [by all such lawful ways and means as shall be thought requisite and deemed advisable by the said [D.],

Assignment by [A.] (the widow) of her share in the partnership property.

And all the right, &c.

Habendum.

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Letter of attorney.

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his executors, administrators, or assigns, or any or either of them], all and singular the said credits, sums of money, goods, and effects, belonging, due, and owing to the said copartnership and joint trade so carried on by them the said [A.] and [D.] as aforesaid, or to them the said [A.] and [D.], or either of them, in respect thereof as aforesaid; and to give receipts or other effectual discharges for all the said monies, credits, and effects which shall be so received or recovered; and upon non-payment thereof, or of any part thereof, to bring, commence, and prosecute any action or actions, suit or suits, or other processes at law or in equity, for the recovery thereof, [and the same to prosecute and carry on to effect, or discontinue or otherwise act in regard thereto, as he, they, or any of them shall think fit or be advised]: and for the purposes aforesaid, one or more attorney or attornies under him or them to appoint, and at his and their pleasure to remove, and appoint any other or others, and generally to do and execute all other acts, deeds, matters, and things, in and about the premises, as fully and effectually as the said [A.] and [D.] might or could do if personally present, [and did or executed the same themselves, and these presents had not been made or executed, the said [A.] hereby giving and granting unto the said [D.], his executors, administrators, and assigns, her full whole power and authority in the premises, and hereby ratifying and confirming, and agreeing further that she the said [A.], her executors and administrators, shall and will ratify and confirm, whatsoever the said [D.], his executors, administrators, or assigns, shall lawfully do, or cause to be done, in or about the premises by virtue of these presents]. And the said [A.], for herself, her heirs, executors, and administrators *doth hereby covenant and agree with the said [D.], his executors, administrators, and assigns, that she the said [A.], or any other person or persons whosoever, claiming or to claim by force or by virtue of any power or authority derived from her, shall not, nor will, at any time or times hereafter, receive, release, or discharge any of the said credits or sums of money, of which the part, share, or interest of her the said [A.] is intended to be hereby assigned as aforesaid; *And further*, that the said [A.], her executors or administrators, shall not nor will, at any time or times

Covenant by [A.] not to discharge any debt.

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Not to disavow or become nonsuit in any ac-

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hereafter, disavow or become nonsuit in any action or suit which may be brought, sued, commenced, or prosecuted for the recovery of any such credits, monies, or effects, nor do or suffer any act, matter, or thing whatsoever, by means whereof the said [D.], his executors, administrators, or assigns, shall be hindered, obstructed, or prevented from recovering, getting in, or obtaining the said credits or sums of money and effects, or any of them, without the consent in writing of the said [D.], his executors, administrators, or assigns first obtained; *And moreover*, that she the said [A.], her executors and administrators, shall and will, upon the request and at the costs of the said [D.], his executors, administrators, and assigns, make, do, and execute all such further acts, deeds, and assurances whatsoever, for the more effectually granting and assigning the said goods, stock, effects, credits, and sums of money, and other the premises, [be the same by grant, assignment, letter or letters of attorney, or otherwise howsoever], as by the said [D.], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably devised, or advised, and required. AND the said [D.], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [A.], her executors, administrators, and assigns, that he the said [D.], his heirs, executors, or administrators, shall and will, on or before the —— day of —— (*d*), well *and truly pay, or otherwise satisfy and discharge, all and every the debts and sums of money due and owing from them the said [A.] and [D.] for or in respect of the said joint trade or copartnership concern so carried on by them since the decease of the said [B.] as aforesaid; and shall and will, with all convenient speed after such payment, satisfaction, and discharge shall be respectively made, procure releases, or other effectual discharges for all such debts and sums of money which shall be so satisfied and discharged, and shall and will obtain duplicates of all such releases and discharges duly executed by the parties giving the same, and shall and will forthwith deliver the said duplicates so executed to the said [A.], her executors, administrators, or

tion to be brought by the assignee.

For further assurance.

Covenant by [D.] to pay all debts owing by the partnership.

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And deliver duplicates of discharges to [D.].

(*d*) It seems advisable, in general, that the covenant to pay the debts should specify some period within which they are to be discharged.

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assigns; *And also,* that he the said [D.], his heirs, executors, or administrators, shall and will at all times hereafter keep harmless and indemnified the said [A.], her executors, administrators, and assigns, and her and their lands and tenements, goods and chattels, from and against all actions, suits, and proceedings at law and in equity, [which shall or may from time to time, or at any time hereafter, be brought, commenced, or prosecuted against the said [A.], her heirs, executors, or administrators], and from and against all costs, charges, damages, and expenses [which she or they shall or may sustain or be put unto] on account of any debt or debts, sum or sums of money, due or owing from or contracted by them the said [A.] and [D.], or either of them, for or in respect of the said joint trade or concern so carried on by them after the decease of the said [B.] as aforesaid, or by reason of the non-payment of the same debts, or any of them, or for or by reason of any act, matter, or thing relative thereto. And in consideration of the premises, she the said [A.], for herself, her heirs, executors, and administrators, doth hereby covenant and agree with the said [D.], his executors, administrators, and assigns, that she the said [A.] shall not nor will at any time or times hereafter, either alone or jointly with or as agent for any person or persons whomsoever, either directly or indirectly, or upon any account or pretence whatsoever, set up, exercise, or carry on the said trade or business of ——, or any branch thereof, within [*330] the distance of —— miles *from —— aforesaid (*e*); and shall not nor will set up, make, or encourage any opposition to the said trade or business hereafter to be carried on by the said [D.], his executors, administrators, or assigns, nor do any act, matter, or thing to the prejudice thereof, and shall not nor will divulge or make known to any person or persons whomsoever any of the secrets, accounts, or transactions of or relating to or concerning the said copartnership so heretofore carried on between them the said [A.] and [D.] since the decease of the said [B.] as aforesaid; And if the said [A.] shall do any act in breach or violation of this present covenant, then that she the said [A.] shall

And to indemnify [A.].

Covenant by [A.] not to exercise the trade, or disclose secrets, or do any act to prejudice [D.].

(*e*) As to the mode of computing distance in the construction of covenants of this nature, *vide Leigh* v. *Hind*, 9 Barn. & Cress. 774.

and will immediately thereupon pay to the said [D.], his executors or administrators, the sum of £——, to be deemed and considered, and the same is hereby declared to be, as and for liquidated and ascertained damages, and in total extinction of the same covenant, and not in the nature of a penalty (*f*). IN WITNESS, &c.

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(*f*) Where a person purchases a share in or the entirety of a business, from a retiring partner or any other person, it is important that the extent of the obligation, if any, intended to be imposed upon the vendor not to exercise the business, should be explicitly defined, as the point occasions much dispute, and it is by no means well settled how far such an obligation is incident to the contract itself.

As to contracts not to carry on a business.

In *Shackle* v. *Baker*, 14 Ves. 468, *ante*, Vol. 3, p. 440, Lord *Eldon* seems to have thought that the vendor of the good-will of a trade (which in this case was that of a milliner) would be at liberty to set up the same trade in another, but not in the same, situation.

In the subsequent case of *Kennedy* v. *Lee*, 3 Mer. 441, however, where two persons carried on business in partnership as nursery gardeners and seedsmen, and upon the dissolution one of them agreed to sell to the other his moiety of the "partnership premises, stock, business, and concern," the same noble and learned judge was of opinion, that, from the terms of this agreement (taken in connection with a correspondence which had passed between the parties), it was not to be understood that the good-will, as distinct from the benefit arising from the possession of the partnership premises, was a subject of the contract; and that there was nothing in the nature of the agreement of the parties which precluded the *selling partner from carrying on the business of a nurseryman when, and [*331] where, and with whom he pleased. A question of this kind underwent much discussion in the case of *Cruttwell* v. *Lye*, 17 Ves. 335; the circumstances of which were as follow:—In the year 1804, George Lye, being at that time engaged in the carrying trade by waggons from Bristol through Bath and Warminster to Salisbury, purchased, from the executor of Wiltshire, his carrying trade by waggons from Bristol through Bath to London, with the premises engaged in that business, consisting of a warehouse in Peter-street, Bristol, and extensive warehouses in Bath. He afterwards took his son, Edward Lye, into partnership with him; and they continued to carry on both those concerns until they became bankrupts, having extended the Warminster and Salisbury concern by setting up a waggon from Salisbury to London. The assignees under the commission put up to sale by auction the whole of this carrying business in different lots, the particular describing Lot 1 as the carrying business of George and Edward Lye, together with the good-will of the extensive premises in Broad-street,

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Bath, used for many years in the business of a common carrier from Bath to London, &c.; also the premises in Peter-street, Bristol, together with the good-will of the long-established trade, &c.: Lot 2 was described, generally, as the interest of the bankrupts in the carrying trade from Bristol to Warminster and Salisbury; stating that the purchaser was to take the stock upon the respective premises, and specifying some particulars, as to the hours at which the waggon would be at the respective places, &c. The first lot was purchased by the plaintiff for 4000*l.* The second lot was purchased by the nephew of one of the assignees; and after Edward Lye had obtained his certificate, he was again put into business in that concern; on which occasion he stated, both by advertisement and by hand-bills distributed, that, being reinstated by his friends in the carrying business, he informed the public that his waggons set out at the usual hours, describing the course, not by the direct road to London, but by the road through Warminster and Salisbury. It was stated by affidavit, that one of the assignees, an uncle of the bankrupt, assisted him by the use of his books in soliciting the customers. Under these circumstances, the plaintiff moved for an injunction.

Lord *Eldon*.—" It is necessary first to consider, whether the sale, under the bankruptcy, of Lot 1, and the good-will belonging to those premises, or the trade established upon them, would, if there was nothing more, upon any principle, prevent the bankrupt immediately, by the assistance of his friends, again setting up the trade from Bristol to London by the very same road; and I cannot say that any of those interests, which a bankrupt is supposed to have by the effect of his certificate, or in the surplus of his estate after payment of his debts, form a principle upon which he should not be permitted to engage again in the like trade, *which in this sort of case is materially distinguished from the same trade.* In *Hogg* v. [*332] *Kirby*, 8 Ves. 215, the defendant's magazine, being published as a continuation of the plaintiff's, was the same. Supposing the bankrupt, therefore, not to have had any other interest, there is no principle upon which this Court could hold that he should not engage in the direct trade by the same road. The bankrupt, however, happens to become the purchaser at the same sale of the Warminster interest; and the further question is, whether that fact affords a principle, not arising out of any engagement, as expressed between the vendor and vendee of Lot 1, or any description of Lot 2, of which the bankrupt was the purchaser, upon which it can be maintained, that, being at liberty to use the Warminster trade, he shall not be at liberty to become a trader in the like trade from Bath to London; and the converse must hold, that the plaintiff also, by a similar equity, cannot convey anything from Bristol through Bath and Warminster to Salisbury. That is a great deal too much to be inferred from any thing that has passed. The good-will, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old

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place. Fraud would form a different consideration; but, if that effect is prevented by no other means than those which belong to the fair course of improving a trade in which it was lawful to engage, I should, by interposing, carry the effect of injunction to a much greater length than any decision has authorized, or imagination ever suggested. What farther was done? The bankrupt advertises that he is reinstated in the carrying business; and, though that expression may have a tendency to misconception, yet he is in a fair sense reinstated; if, being at liberty, he has availed himself of that situation to set up again that carrying business. It amounts to no more than that he asserts a right to set up this trade, and has set it up, as the like, but not the same, trade with that sold, taking only those means which he had a right to take to improve it; and there is no fact amounting to fraud upon the contract made with the plaintiff. The question, whether, under the circumstances, the plaintiff is to carry the agreement into execution if the assignees have taken from him actively the benefit of that contract, is very different; but, whatever opinion may be held upon this transaction in that view of it, I do not see the fraud upon which, as a judge in equity, I can lay my hand; and I dare not from this place so deal with it."

The conclusion from the preceding case seems to be, that the sale of the good-will of a business does not necessarily imply an engagement on the part of the vendor to refrain from exercising it, unless, from the nature of the business, it can be maintained that the concern in which he has subsequently engaged is not merely similar to, but is the same as that which has been the subject of the sale. Lord *Eldon* appears to have founded his reasoning on the general principle, and not on any peculiarity in the situation of the bankrupt as distinguished from the assignee, who was the actual vendor.

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Equity will injoin against the breach of an agreement not to exercise a business.

*If the vendor has stipulated not to carry on the business, equity will restrain him by injunction from doing so. *Hardy* v. *Martin*, 1 Cox, 26, *Williams* v. *Williams*, 2 Swanst. 253. And where a person had received a sum of money under an award (and the same principle, it is conceived would apply to any other instrument), as a consideration for the purchase of the good-will of a business, with an understanding that he was not to set up trade in the vicinity of the same place, the Court would not allow him to act in opposition to this understanding, though the award itself was silent as to the prohibition. *Harrison* v. *Gardner*, 2 Madd. 198, (noticed *ante*, Vol. 3, p. 440).

Such contracts usually accompanied by an agreement to pay a sum as liquidated damages.

It is usual, however, for the purchaser of the good-will of a business to stipulate for a still more powerful protection against the violation of the covenant under consideration, by means of a provision, as in the text, entitling him to a specific sum by way of liquidated damages, in case of breach. Of the efficiency of such an agreement, if contained in an instrument under hand and *seal* (*vide ante*, Vol. 3, p. 445 *a*, 2nd ed.), and confined to the breach of any particular covenant—not of any one of a series

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of covenants (*ante*, p. 86), no doubt can now be entertained; and, therefore, on the one hand, while the advantage of a provision of this kind to a purchaser is obvious, in preventing the necessity of his adducing evidence of the extent of the injury he has sustained,—evidence which, from the nature of the case, it is often very difficult to obtain, and in entitling him to recover a sum frequently far exceeding the amount of that injury, it behoves a vendor, for the same reasons, to use caution in entering into such a covenant, or rather to see that, having entered into, he does not violate it; for the seeming disproportion, however great, between the sum fixed as damages, and even the highest reasonable estimate of the actual amount of loss, would not, it is conceived, afford any ground for relief at law or in equity. If the covenantee chooses to exact it, the covenantor has no alternative but to submit. It should be observed, that equity will not be prevented from granting an injunction against setting up a business, because the agreement is enforced by a penalty, for which the plaintiff has obtained a verdict. *Hardy* v. *Martin*, 1 Cox, 26; *Barret* v. *Blagrave*, 5 Ves. 555; see also *Tall* v. *Ryland*, 1 Ch. Cas. 183. Where it is intended that the vendor of the good-will of a business shall not be restrained from carrying it on, it is better expressly to negative the implication of any such restriction by such a clause as the following:—

Vendor to be at liberty to set up business.

"Provided, nevertheless, and it is hereby declared, that nothing herein contained shall extend or be construed to extend to prevent or restrain the said [*vendor*] from setting up or exercising the said trade or business of a —— at any place or places whatsoever, and in any manner that he shall think proper."

Local restraint on trade bad from being too extensive.

An agreement not to carry on any particular trade, unrestrained in regard to locality and time, is clearly bad, on principles of public policy, and even a local restraint cannot be supported if it extend beyond the limits which are required by the object which the parties have in view. On this ground the Court of Common Pleas lately decided against the legality of a covenant in articles of servitude entered into with a surgeon-dentist binding the covenantor (the assistant), at the end of the term, not to practise as a surgeon-dentist *within* 100 *miles of York*, if the covenantee were then living and practising. Lord Chief Justice *Tindal* observed—"No certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive. In *Davis* v. *Mason*, 5 D. & E. 118, where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the plaintiff, 150 miles was not considered an unreasonable restraint, where an attorney had bought the business of another, who had retired from the profession. But it is obvious that the profession of an attorney requires a limit of a much larger

ASSIGNMENT BY ADMINISTRATOR, AND DISSOLUTION OF PARTNERSHIP FORMED WITH THE WIDOW.

range, as so much may be carried on by correspondence, or by agents. And, unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to shew them reasonable, bad in the eye of the law; and, upon the bare inspection of this deed, it must strike the mind of every man, that a circle round York, traced with the distance of one hundred miles, incloses a much larger space than can be necessary for the plaintiff's protection. The nature of the occupation, which is one that requires the personal presence of the practiser and the patient together at the same place, shews at once that the plaintiff has shut out the defendant from a much wider field than can by possibility be occupied beneficially by himself. There is, therefore, on the one hand, no reason why the defendant should not gain his livelihood; nor, on the other, why the public should not receive the benefit of his skill and industry through so wide a space. The contract appears still further unreasonable on this ground; as it is to hold good during the whole time the plaintiff continues to carry on his business, wherever he may be; so that, if the plaintiff removed from York, to places where the practice at York by the defendant could not injure him, still the restriction continues. We therefore think the contract is one which contains a restraint of the defendant to carry on his trade, far larger than is necessary for the protection of the plaintiff in the enjoyment of his trade; and, consequently, that the covenant creating such restraint cannot form the subject of an action." *Horner* v. *Graves*, 5 Moore & Payne, 768.

It remains to be observed, that an agreement mutually entered into by two travelling trunk-makers not to interfere with each other's business in certain districts, and not to aid or assist any person in opposing each other; and that if any person should set up and oppose either of the parties, they would meet together and enter into such mutual agreement as should be beneficial to their mutual interests—not operating in general restraint of trade, is good. *Wickens* v. *Evans*, 3 You. & Jerv. 318. See further on this subject, *ante*, Vol. 1, p. 172; Vol. 3, p. 293.

DEED OF COVENANT, &c.

DEED *executed on the* DISSOLUTION *of a* PARTNERSHIP *(indorsed on Articles) where* ONE PARTNER *takes all the* CREDITS *and* EFFECTS (*a*), *and, together with a* SURETY, COVENANTS *to indemnify the other against the* PARTNERSHIP DEBTS, *&c.* INDEMNITY *to* SURETY. *Provision respecting the Custody of the Deed. (A concise Form).*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN the within-named [A.], of the first part; the within-named [B.], of the second part; and [C.], of &c., of the third part: WHEREAS the partnership subsisting between the said [A.] and [B.], by virtue of the within-written indenture, was this day dissolved by effluxion of time, and notice of the dissolution thereof has been subscribed by the said [A.] and [B.] respectively, in order to its being inserted in

Recital of dissolution of partnership.

Remarks upon the precedent in the text.

(*a*) The precedent in the text comprises all that is absolutely requisite to carry into effect an arrangement of this nature; for the assignment and power of attorney usually executed by the selling to the purchasing partner are not essential in order to vest the property in the latter. The stock in trade, and other personal chattels, susceptible of manual delivery, pass by such delivery; the credits, being *choses en action*, are not assignable; and even the power of attorney authorizing the continuing partner to receive and recover the latter, may be dispensed with, since the individual members of a dissolved firm are as competent to receive and give discharges for the joint credits as actual partners. All, therefore, that the purchaser wants is indisputable evidence that the stock in trade, &c. of which he has been put in possession, and the credits which he is to receive, are to become his exclusive property; and that he should be protected by express covenant against any infringement of or interference with the rights incident to such property. The covenant in the precedent in the text would be as effectual for this purpose as the more formal and explicit covenants commonly inserted.

the London Gazette, which advertisement is to be inserted at the sole expense of the said [B.]. AND WHEREAS it has been agreed between the said [A.] and [B.], that the said [B.] shall have and receive the entire partnership stock, credits, and effects, in consideration of the covenant on the part of him and the said [C.], as his surety, hereinafter contained; and the same are intended, immediately after the execution hereof, to be delivered over to the said [B.]: NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, he the said [A.], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [B.], his executors, or administrators, that he the said [A.] hath now full power and right to sell and dispose of his one —— share in the said partnership stock, credits, and effects, free from all charges or incumbrances whatsoever created or suffered by him the said [A.], and that he the said [A.] hath not heretofore received or discharged any of the said partnership credits, except such as appear by the partnership books to have been received or discharged; and that it shall be lawful for the said [B.], his executors, administrators, or assigns, henceforth to have, receive, take, and enjoy the said share of him the said [A.] of and in the said stock in trade, credits, and effects belonging to the said late partnership, to and for his and their own exclusive use and benefit, without any interruption or denial by the said [A.], his executors and administrators, or any person or persons claiming through or under him or them; *And further*, that he the said [A.], his executors or administrators, will at all times hereafter, upon the request and at the costs of the said [B.], his executors, administrators, or assigns, make and execute, or cause to be made and executed, all such further acts, powers, and assurances whatsoever, for more effectually vesting the said share of him the said [A.] of and in the said partnership stock in trade and effects, in the said [B.], his executors, administrators, or assigns, and enabling him and them to recover and receive the said partnership credits, as by the said [B.], his executors, administrators, or assigns, shall be reasonably required: AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said recited agreement, and in consideration of the premises, the said [B.], and also the said [C.] as his surety, do, for themselves,

DEED OF COVENANT, &c.

Testatum.

Covenants by [A.].

Further *testatum.*

DEED OF COVENANT, &c.

Joint and several covenant by [B.] and [C.].

their heirs, executors, and administrators, jointly, and each of them doth for himself, his heirs, executors, and administrators, severally, hereby covenant with the said [A.], his heirs, executors, and administrators, that they the said [B.] and [C.], or one of them, their or one of their heirs, executors, or administrators, will duly pay all the debts and sums of money owing from or by the said [A.] and [B.] on account of their said late partnership as aforesaid, at the respective times, and in the manner following, (that is to say), such of the said debts as are already due and payable within the period of three calendar months from the date hereof, and the residue of the said debts within the period of three calendar months after the same shall become due and payable, and will effectually keep indemnified him the said [A.], his heirs, executors, and administrators, from and against all losses, costs, damages, and expenses whatsoever, by reason or on account of the non-payment of the same several debts, or any of them, at the respective periods aforesaid, or at any other period whatsoever: And also from and against all losses, costs, damages, and expenses whatsoever, by reason or on account of any action or suit, actions or suits, or other proceedings at law or in equity, in which the said [B.], his executors or administrators, shall at any time hereafter use in the name or names of the said [A.], his executors or administrators, (and which he the said [B.], his executors or administrators, is and are hereby authorized to do), or otherwise in relation thereto (*c*). AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of an agreement entered into by the *said [B.] previously to the said [C.] agreeing to join as his surety in the covenant here-

Further *testatum.*

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(*c*) Add, if deemed requisite:—

As to debts contracted by covenantee partner not entered in partnership books.

"Provided, nevertheless, and it is hereby declared, that this present covenant shall not render or make liable the said [B.] and [C.], or either of them, their or either of their heirs, executors, or administrators, to the payment of any debt or debts which the said [A.] may have contracted on account of the said partnership, and which shall not have been duly entered in the partnership books."

inbefore contained, he the said [B.], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [C.], his heirs, executors, and administrators, that he the said [B.], his heirs, executors, or administrators, will at all times hereafter effectually keep indemnified the said [C.], his heirs, executors, and administrators, from all losses, costs, charges, damages, and expenses, by reason of the said [C.] having joined and concurred in the covenant hereinbefore contained on the part of the said [B.] and [C.], or by reason of any act, matter, or thing in anywise relating thereto (*d*): *And lastly*, it is agreed by and between the said parties hereto, that the within-written indenture, and these presents indorsed thereon, shall be deposited, for safe custody, on behalf of all the said parties hereto, with [D.], of ——, attorney at law, to be produced by him to and for the benefit of the said parties respectively, and their respective heirs, executors, or administrators, when and as often as occasion shall require; and the said parties respectively, or their respective heirs, executors, or administrators, shall be at liberty, as often as they shall think proper, at their own costs, to obtain from the said [D.] copies or extracts of or from the same indentures, or either of them (*e*). IN WITNESS, &c.

DEED OF COVENANT, &c.

Covenant of indemnity by principal with surety.

Deed to be deposited with a third person for the benefit of all parties.

(*d*) Without a covenant of this kind, the surety paying any monies on account of the joint obligation of him and the principal debtor, would be a simple contract creditor only of the latter. *Copis* v. *Middleton*, 1 Turn. 224. The addition of such a covenant clearly does not subject the deed to any further stamp, as the covenant of the principal and surety with the creditor, and of the surety with the principal to indemnify him against the former covenant, are considered as parts of the same transaction. *Annandale* v. *Pattison*, 9 Barn. & Cress. 919. There is an objection, however, to the introduction of such a covenant in the principal deed, where the deed is not in the possession or power of the surety, but which, in the present case, is prevented by the following provision in the text respecting the custody of the deed.

As to the covenant to indemnify the surety.

(*e*) This clause will be D.'s authority to produce the deed to the respective parties. There is the less reason for obtaining from him a covenant for its production, because he, being an attorney, might be compelled by a summary application to the Court to which he belonged, to produce it.

DISSOLUTION OF PARTNERSHIP BETWEEN THREE.

DEED *of* DISSOLUTION *of* PARTNERSHIP *between* THREE PERSONS, ONE *of whom* PAYS *to the* OTHER TWO *the Amount of their* SHARES *according to a* VALUATION *of the Stock, &c., and is to* RECEIVE *the* CREDITS *and* PAY *the* DEBTS (*a*). *Credits unreceived by a certain Day to be sold to one of the Partners.* DEFICIENCY *in* CREDITS *to be made good out of a* RESERVED FUND, *and any* DEFICIENCY *in* SUCH FUND *to be contributed by the* RESPECTIVE PARTNERS; SURPLUS *of the* RESERVED *Fund to be divided.* COVENANT *by one of the Partners for the* PRODUCTION *of the* BOOKS *and* PAPERS. MUTUAL RELEASES. AGREEMENT *to* REFER DISPUTES *to certain* ARBITRATORS NAMED.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [A.], of &c., of the first part; [B.], of &c., of the second part; and [C.], of &c., of the third part: WHEREAS *(recite Articles of Partnership, describing the term, the shares of the partners, and setting forth verbatim a clause authorizing any one of the partners to dissolve it by giving a certain notice)*: AND WHEREAS, pursuant to the power in that behalf contained in the hereinbefore recited indenture, the said [A.], on the —— day of ——, gave a notice or intimation in writing to the said [B.] and [C.] of his intention to dissolve the said partnership by virtue of the said power, on and from the expiration of —— calendar *months from the date thereof, being the —— day of —— last (*b*): AND WHEREAS, by a memorandum of agree-

Recital of partnership, &c.

—Of the partnership having been dissolved by the notice of one of the partners.

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—Of agreement

(*a*) Here, it will be perceived, the partner continuing the trade purchases the shares of the others in the stock, machinery, &c., only, and not in the credits, which he receives on behalf of himself and his partners.

(*b*) Though the general rule is, that a covenant under hand and seal can only he discharged or qualified by an instrument of equal solemnity,

ment, bearing date on or about the —— day of —— last, and made between the said parties to these presents, it was agreed that the said partnership should be dissolved, and that all the stock in trade, consisting of goods, merchandizes, and utensils of trade belonging to the said partnership, should be valued, and that the said [C.] should become the purchaser of the said respective shares of the said [A.] and [B.] therein, according to such valuation; And it was further agreed, that the said [C.] should collect and receive all the credits of the said partnership on behalf of the said respective partners, and should pay thereout all the debts owing therefrom, so far as the same should extend to pay the same; and inasmuch as it was expected that the fund to arise from the credits of the said partnership would be inadequate to liquidate the debts thereof, it was agreed that the sum of £—— should be deposited by the said parties in the bank of Messrs. [E. & Co.] at —— aforesaid, as a reserved fund for the purpose of supplying such deficiency, and which fund it was stipulated should be subject to the provisions therein mentioned, and which are hereinafter more particularly expressed: And whereas the said stock in trade hath been valued at the sum of £——; And whereas an account hath been stated by and between the said parties hereto concerning the said partnership trade, dealings, and profits, up to the day of the date of these presents, and of all pecuniary and other transactions between the said respective partners relating thereto; and after giving to the said [A.] and [B.] credit for their respective shares in the amount of the value of the said stock in trade, and deducting from the partnership monies the sum of £—— as a reserved *fund for the purposes aforesaid; it appeared that there remained due upon the balance of the said account from the said [C.] unto the said [A.] for his share of the capital joint stock of the said partnership and the profits thereof, the sum of £—— and no more; and unto the said [B.] for his share of the said capital joint stock and profits, the sum of £—— and no more, as they the said parties

DISSOLUTION OF PARTNERSHIP BETWEEN THREE.

between the parties respecting the dissolution.

Of accounts having been taken.

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—Of the balances found to be due to [A.] and [B.] on the taking of the partnership accounts.

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yet of course this rule does not apply where the deed itself authorizes the modification of its provisions by a less formal instrument, as in the present case.

DISSOLUTION OF PARTNERSHIP BETWEEN THREE.

hereto do hereby respectively acknowledge: AND WHEREAS the said [C.] hath this day paid unto the said [A.] and [B.] respectively the said balances or sums of £—— and £—— owing to them respectively as aforesaid, as the said [A.] and [B.] do hereby acknowledge: AND WHEREAS the said [A.] and [B.] have this day delivered over to the said [C.], for his exclusive use and benefit, the said stock in trade belonging to the said partnership, as the said [C.] doth hereby acknowledge: AND WHEREAS the said sum of £—— has been deposited in the hands of the said Messrs. [E. & Co.] in the joint names of them the said parties to these presents immediately before the execution of these presents, pursuant to the said recited agreement: NOW THIS INDENTURE WITNESSETH, that, in further pursuance of the said agreement, each of them the said [A.], [B.], and [C.], for himself, his heirs, executors, and administrators, doth hereby covenant, declare, and agree with and to the other and others of them, that the said partnership heretofore subsisting between them as aforesaid, shall, from and immediately after the execution of these presents, be determined and dissolved to all intents and purposes whatsoever; And that the notice of such dissolution, signed by them the said parties respectively, and deposited in the hands of [T. R.], of ——, attorney at law, shall be forthwith inserted in the London Gazette, and in the provincial newspapers published in ——, at the joint expense of them the said parties hereto: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said recited agreement, the said [A.] and [B.] *Do*, and each of them *Doth* hereby constitute and appoint the said [C.], his executors and administrators, the true and lawful attorney and attornies irrevocable of them the said [A.] and [B.], and *of each of them, in their or either of their names or name, or in the joint names of them the said [A.], [B.], and [C.], or otherwise, as shall be deemed expedient, to ask and demand, sue for, recover, and receive, of and from all persons whom it shall or may concern, all and every the sum and sums of money and credits now owing to the said partnership; and upon the receipt thereof respectively to give sufficient acquittances and discharges for the same, and with full power and authority to state, settle, and finally adjust with

—That [C.] has paid these sums. —That the stock, &c., have been delivered to him.

£—— reserved, deposited at a bank.

Testatum.

Partnership dissolved from the date.

Notice to be inserted in the Gazette and other papers.

Second *testatum.*

Power of attorney to [C.] to receive, &c. the partnership credits.

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DISSOLUTION OF PARTNERSHIP BETWEEN THREE.

any person or persons, all accounts, reckonings, claims, and demands whatsoever concerning the said partnership trade, business, or estate, or any dealings and transactions relative thereto; and to compound, release, or submit to arbitration (*c*) all such accounts, reckonings, claims, and demands as aforesaid, or any other matter or thing whatsoever *relating to the said partnership estate, trading, and dealings, in such manner as the said attorney or attornies shall from time to time think fit or expedient; and in the names or name of them the said [A.] and [B.], or either of them, or in the joint names of them the said [A.], [B.], and [C.], or otherwise, to enter into and execute all such bonds or agreements for submitting the same to arbitration as shall be requisite in that behalf; and also to execute such bankrupt's certificates or such letters of licence to or in favour of any debtors of the said partnership, as he or they shall

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(*c*) Where the person to whom the letter of attorney is given is to become solely interested in the monies he receives (which was the case in the former precedents), it is of course less requisite to define the extent of his power in these particulars than where he receives them as the agent of the firm. Sometimes the credits are to be collected by a third person, but in such a case the power is more conveniently given by a separate instrument, which is deposited with the attorney. In such a case, however, the deed of dissolution should contain a covenant by the partners not to interfere with the receipt of the credits by the agent, as the mere vesting of this authority in a third person does not impliedly supersede the right of the parties themselves to receive them. Thus, where, on the dissolution of a partnership between A. and B., it was agreed that C. should collect and receive the debts of the partnership; and C. applied to a debtor of the firm for payment of his debt, at the same time acquainting him with the dissolution of the partnership, and that he had been authorized to collect the debts: the debtor promised payment in a few days, but afterwards paid the debt to A.; and it was held that this payment was good, for that the agreement between the parties only extended to authorize C. to receive the debts, and did not exclude the parties themselves from doing so. *Porter* v. *Taylor*, 6 Maule & Selwyn, 156.

As to power to third person to collect the credits.

This seems to be the same case as *Bristow* v. *Taylor*, 2 Stark. 50, stated *ante*, Vol. 4, p. 139, where, however, the payment to the principal was supported upon another ground, namely, that the agent's authority was revocable by the constituent parties, and that the act of one of them in receiving the money amounted to a revocation.

DISSOLUTION OF PARTNERSHIP BETWEEN THREE.

think proper; And moreover, to indorse and negotiate any promissory notes or bills of exchange which shall or may come to the hands of the said [C.] in the course of his winding up the affairs of the said partnership, whether the same shall have been made, drawn, indorsed, or accepted, unto or in favour of the said late partnership firm, or unto or in favour of them the said [A.], [B.], and [C.] respectively, or any or either of them on account thereof (*d*); And, generally, to do and execute all such other acts and things as shall be requisite in or about the premises, as effectually as if they the said [A.] and [B.] were personally present to do the same; and with power and authority for all or any of the purposes aforesaid to appoint any substitute or substitutes for him the said [C.], his executors or administrators, and such substitution from time to time, at his or their pleasure, *to revoke; the said [A.] and [B.] respectively hereby allowing and confirming, and agreeing at all times hereafter to allow and confirm, whatsoever their said attorney or attornies, or his and their substitute and substitutes, shall lawfully do in or about the premises. And for the considerations hereinbefore expressed, the said [A.] and [B.] for themselves respectively, and for their respective heirs, executors, and administrators, (but each of them so as to be answerable for his own acts, deeds, and defaults only), do hereby covenant and declare with and to the said [C.], his executors, administrators, and assigns, in manner

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Covenant by [A.] and [B.] not to obstruct proceedings, &c., by [C.].

As to giving partner a power to indorse bills.

(*d*) Though a clause to this effect is not commonly introduced into the letter of attorney given by one partner to another at a dissolution, yet it seems advisable to insert it; as the want of a power to indorse and negotiate bills, which the partner, who has the winding up of the joint affairs, receives on behalf of the partnership (as to which *vide ante*, p. 28), is often found to be an inconvenience. Sometimes it may also be desirable to extend the power to the drawing and accepting of bills on behalf of the firm for partnership debts. In that case the following addition may be made to the clause:—

Power to draw bills, &c., in the name of the firm.

"And also in the joint names of them the said [A.], [B.], and [C.], to make, draw, and accept any promissory notes or bills of exchange for securing any debts or sums of money due or owing from the said partnership, but not for any other intent or purpose whatsoever."

following, (that is to say); that they the said [A.] and [B.] respectively, and their respective executors and administrators, shall not, nor will any of them at any time or times hereafter, intermeddle with, receive, or discharge any of the said partnership monies, chattels, or effects, nor release, discontinue, or become nonsuit in any action, suit, or other legal proceeding which shall be brought, commenced, or prosecuted for the recovery thereof, or of any part of the same, unless with the consent in writing of the said [C.], his executors or administrators, nor shall or will revoke, or in any manner invalidate, all or any of the powers and authorities hereby given to the said [C.], his executors and administrators, as aforesaid, nor do or execute, or knowingly permit to be done or executed, any act, matter, or thing whatsoever, by means whereof the said [C.], his executors or administrators, shall or may be obstructed in the recovery or receipt of the said partnership credits, goods, monies, chattels, and effects, or any part of the same, or in the exercise of all or any of the powers and authorities to him and them given as aforesaid; *And moreover*, that they the said [A.] and [B.] respectively, and their respective executors and administrators, shall and will, at all times hereafter, upon every reasonable request, and at the costs of the said [C.], his executors or administrators, make and execute all such further acts, deeds, and assurances whatsoever, for more effectually vesting in the said [C.], his executors or administrators, all the share and interest, or respective shares and interests, of them the said [A.] and [B.] respectively, or their respective executors and *administrators, of, in, to, out of, or upon the said partnership stock in trade, chattels, and effects, (except the credits thereof), and also shall and will, on the request of the said [C.], his executors, administrators, or assigns, but at the joint and equal costs and expense of the said [A.], [B.], and [C.], and their respective executors, administrators, or assigns, make and execute such further acts, deeds, matters, and things, for the more effectually enabling the said [C.], his executors or administrators, to recover and receive the said partnership credits, and for corroborating the powers hereby given to him and them, as his or their counsel shall reasonably advise or require. AND THIS INDENTURE FURTHER WIT-

DISSOLUTION OF PARTNERSHIP BETWEEN THREE.

—Nor revoke the power.

For further assurance.

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Further *testatum*.

DISSOLUTION OF PARTNERSHIP BETWEEN THREE.

NESSETH, that, in consideration of the premises, the said [C.] doth for himself, his heirs, executors, and administrators, covenant and agree with them the said [A.] and [B.] respectively, and their respective executors and administrators, by these presents, in manner following, (that is to say), that he the said [C.] shall and will from time to time, with and out of the monies which shall come to his or their hands by virtue of these presents, pay or cause to be paid, in due course of payment, all and every the debt or debts owing by or from the said [A.], [B.], and [C.], in respect of their said late partnership, or any matter or thing relating thereto; And also shall and will at all times hereafter well and effectually keep harmless and indemnified (*e*) the said [A.] and [B.] respectively, *and their respective heirs, executors, and administrators, and the goods and chattels, lands, and tenements of them respectively, from and against all costs, damages, and expenses whatsoever, which they the said [A.] and [B.] respectively, or their respective heirs, executors, or administrators, shall or may pay or incur by reason of the non-payment of all and every, or any, of the said debts by him the said [C.], his executors or administrators, pursuant to his

Covenant by [C.] to pay debts out of the credits,

—and indemnify the others.

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Where, in the administration of assets, a bond or covenant of indemnity is to be regarded as a debt.

(*e*) It has been decided, that if a bond or covenant of indemnity of this nature be forfeited or broken in the life-time of the obligor or covenantor, the obligee or covenantee is, at the decease of the obligor or covenantor, a specialty creditor; *Cox* v. *Joseph*, 5 D. & E. 307; although the amount of the damages incurred by the breach was, at the time of such decease, unascertained; and consequently an executor is not entitled to retain a simple contract debt due to himself against the claim of such an obligee or covenantee. *Musson* v. *May*, 3 Ves. & Bea. 194. It is clear, on the other hand, that an *unbroken* or *unforfeited* covenant or bond of this nature is not, in the administration of the assets, to be considered as a debt, and, therefore, cannot be pleaded by an executor or administrator to an action by a simple contract creditor; and it follows, as a further obvious consequence of this principle, that an executor or administrator may plead *plene administravit before* the breach or forfeiture of such a covenant or bond to an action brought thereon after breach or forfeiture. *Milles* v. *Sherfield*, Cro. Jac. 102; *Woodcock* v. *Hern*, Goldb. 14, pl. 57; *Ellis* v. *Lambert*, cit. 2 D. & E. 101; *Smith* v. *Harmon*, 6 Mod. 142; *Plumer* v. *Marchant*, 3 Burr. 1380, Vin. Abr. tit. *Executor*, (X a. 5), pl. 12, and margin.

DISSOLUTION. OF PARTNERSHIP BETWEEN THREE.

covenant hereinbefore contained (*f*): PROVIDED ALWAYS, and it is hereby declared and agreed, that in case any sum or sums of money now owing to the said late partnership shall remain outstanding and unreceived by the said [C.], his executors or administrators, on the said —— day of —— next ensuing, then, and immediately thereupon, an account of such sum and sums of money shall be delivered in writing by the said [C.], his executors or administrators, to the said [T.R.], with instructions * to apply for the same, and enforce the payment thereof by action at law or otherwise with all possible dispatch, and to pay unto the said [C.], his executors or administrators, all and every such sum and sums of money as shall be received and recovered, to be applied by him or them in manner aforesaid: PROVIDED ALSO, and it is hereby further declared, that in case any credits of the said partnership shall remain outstanding or unreceived by the said [C.], his executors or administrators, or by such other means as aforesaid, on the —— day of —— next ensuing, then and in such case, and immediately thereupon, all such credits as shall be so outstanding and unreceived, shall be sold and disposed of in one lot unto such of them the said [A.], [B.], and [C.], as shall be willing to purchase the same, and shall offer the largest price or sum for the same, and, in the case

If debts outstanding on a certain day.

Solicitor to be instructed to recover them.

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If outstanding two months afterwards to be sold to highest bidder.

(*f*) If there is a possibility of the sums to be received by C. under the power of attorney exceeding the amount of the debts to be paid by him, he should covenant to apply the excess thus:—

"And further, that in case, after paying all the debts owing by the said partnership out of the monies to be received by the said [C.], his executors or administrators, by virtue of the power hereinbefore contained, any residue or surplus shall remain in his or their hands unapplied to the purposes aforesaid, then, that he the said [C.], his executors or administrators, shall from time to time retain, pay, and divide the same, when and as they shall be received, and so often as the same shall amount to the sum of £——, unto and between himself the said [C.], and the said [A.] and [B.], or their respective executors or administrators, in the shares and proportions following, (that is to say); *(specify shares)*.

Covenant by [C.] to pay over the balance remaining in his hands after payment of debts.

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of equality of bidding, the preference shall be determined by lots; And in case the said [A.] or [B.] shall become the purchaser of the said credits, the same shall be assigned and released to him at his costs by all proper and necessary parties, with the usual powers and authorities for recovering, receiving, and giving discharges for the same, in consideration of his paying the purchase money thereof unto the said [C.], his executors or administrators, to be applied in the manner hereinbefore mentioned with regard to the said partnership credits; and upon such assignment or power being executed or given to the said [A.] or [B.] as aforesaid, the power hereby given to the said [C.], his executors and administrators, shall thenceforth cease and be void; And if the said [C.] shall become the purchaser of the said credits, he shall be charged with the amount of the price or purchase money thereof as a sum received by him by virtue of these presents. And it is hereby further declared and agreed, that the said sum of £——, so as aforesaid deposited in the bank of the said Messrs. [E. and Co.], shall be and remain as or in the nature of a reserved fund to answer and make good any debt or debts which shall, on the said —— day of —— next, remain owing by the said partnership, and which the monies that shall have been received by the said [C.], his executors and administrators, *by virtue of these presents, shall be insufficient to satisfy, and also to reimburse to the said [C.], his executors or administrators, any sum or sums of money which he or they shall have paid or incurred beyond the sums so received by him or them as aforesaid in the liquidation of the debts owing from the said partnership, or in the collection and recovery of the said partnership credits; And that the said sum of £——, or a sufficient part thereof to answer the several purposes aforesaid, shall be paid and applied accordingly; To which end, therefore, the said parties to these presents respectively, or their respective executors or administrators, shall and will, on the said —— day of —— next, or as soon afterwards as conveniently may be, join and concur in giving proper orders to the said Messrs. [E. and Co.] to pay the same to the said [C.], to be applied by him for the purposes and in the manner aforesaid; And if, after such payment and application, there shall be or remain any part of the said sum of £—— in the said bank un-

£—— set apart as a reserved fund, how to be applied.

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Residue of reserved fund to be divided.

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applied and inapplicable as aforesaid, then the same shall be immediately divided amongst the said parties to these presents, their executors or administrators, in the several shares and proportions following, (that is to say); *(specify the proportions)*; *Provided always*, and it is hereby further declared and agreed, that in case the said reserved fund or sum of £—— shall be found insufficient to answer and make good the several payments hereinbefore mentioned and agreed to be made thereout as aforesaid, then and in such case they the said parties to these presents respectively, or their respective executors or administrators, shall and will, within —— calendar months next after the said —— day of —— next, make good such deficiency by contributing thereto in the several shares and proportions following, (that is to say); the said [A.], his executors or administrators, one equal —— share thereof; the said [B.], his executors or administrators, one equal —— share thereof; and the said [C.], his executors or administrators, the remaining —— share thereof; and the respective proportions of the said [A.] and [B.] shall be paid to the said [C.] to be applied by him for the purposes and in the manner aforesaid. *AND WHEREAS it hath been agreed by and between the said parties, that all the books of account, invoices, letters, receipts, papers, and other vouchers of and belonging to the said partnership, shall remain in the custody of the said [C.], his executors and administrators, upon his entering into the covenant hereinafter contained. NOW THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the said agreement, he the said [C.], for himself, his heirs, executors, and administrators, doth hereby further covenant and agree with the said [A.] and [B.] respectively, and their respective executors and administrators, that he the said [C.], his executors or administrators, shall and will, at all times hereafter, until the said partnership accounts shall be finally settled and closed in manner aforesaid, according to the true intent and meaning of these presents, preserve and keep the said books of account, accounts, invoices, letters, receipts, papers, and vouchers, in his or their counting-house for the time being, or in some other convenient place in the city of —— aforesaid, whereof the said [A.] and [B.] respectively, or their respective executors or administrators, shall have due

If £—— insufficient, parties to make good deficiency.

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Recital of agreement that books and vouchers shall be left in hands of [C.].

Further *testatum*.

Covenant by [C.] for their preservation and production.

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notice (accidents by fire, thieves, or other casualties only and always excepted); And that it shall be lawful for the said [A.] and [B.] respectively, or their respective executors or administrators, or their respective agents or accountants for the time being, at all reasonable times during such period as aforesaid, to have free access to the same books of account, accounts, invoices, letters, receipts, papers, vouchers, and every or any of them, with free liberty to inspect, examine, copy out, and make extracts from the same, without any interruption or denial whatsoever by him the said [C.], his executors or administrators, or with his or their privity, consent, or procurement; And also, that he the said [C.], his executors or administrators, shall and will, on the first day of every calendar month, until the —— day of —— next, render and give unto them the said [A.] and [B.] respectively, or their respective executors or administrators, an account in writing of all the sums of money now owing to the said partnership, which he the said [C.], his executors or administrators, shall or may have received, [*349] *and also of all the sum or sums of money owing by the said partnership, which he or they shall have paid and discharged, in order that they the said [A.] and [B.] respectively, or their respective executors or administrators, may from time to time know what sums of money now owing to or by the said partnership shall remain unreceived and unpaid. AND MOREOVER THIS INDENTURE WITNESSETH, that, in further pursuance of the said recited agreement, and in consideration of the premises, the said [C.] hath remised, released, and for ever quit claimed, and by these presents doth, for himself, his heirs, executors, and administrators, fully and absolutely remise, release, and for ever quit claim unto the said [A.] and [B.], and each of them, their and each of their heirs, executors, and administrators, all and all manner of actions, causes of actions, suits, differences, [controversies, quarrels, covenants, bonds, bills, notes, accounts, reckonings, sum and sums of money, damages], claims, and demands whatsoever, both at law and in equity, or otherwise howsoever, which he the said [C.] now hath, or which he, his heirs, executors, or administrators can or may have, claim, challenge, or demand of, from, against, or upon the said [A.] and [B.], or

Covenant by [C.] to deliver monthly account to the other partners.

Further *testatum.*

General releases.

either of them, their or either of their heirs, executors, or administrators, by reason of their said late joint trade, or the said partnership hereby dissolved, or any other matter or thing whatsoever from the beginning of the world to the day of the date of these presents, (the covenants herein contained, on the respective parts of the said [A.] and [B.], and their respective heirs, executors, and administrators, to be observed and performed (*g*), only excepted); And in further *pursuance of the said recited agreement, and in consideration of the premises, the said [A.] hath remised, &c., *(release to* [B.] *and* [C.]; *add similar release by* [B.] *to* [A.] *and* [C.] (*h*)*).* And *it is hereby further provided and agreed*, that if, at any time or times hereafter, or before the accounts between the said parties concerning the said partnership shall be finally settled and closed, any dispute or difference shall arise between them the said parties, or any two of them, or between the survivors or survivor of them, and the executors or administrators of the others or other of them, concerning the true construction of these presents, or any covenant or thing herein contained, or any accounts to be stated or settled in pursuance hereof, or any fact, matter, or thing relating to the said partnership, or the concerns thereof, then, and so often as the same shall happen, all such matters in difference shall be submitted and referred to the award and determination of [D.], of ——, and [E.], of —— (*i*), (arbitrators indifferently chosen

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Arbitration clause referring disputes to arbitrators named.

(*g*) Add, if any other deed be executed between the parties containing covenants by the releasee—

"And also the covenants contained in a certain indenture bearing even date," &c.

Where, at the dissolution of a partnership, freehold or leasehold property is to be conveyed to one of the partners, it is convenient to effect this by a separate deed, in order that the deed of dissolution may not form a necessary part of the title.

(*h*) But the most concise mode is for each to release to the others generally, *ut ante*, p. 317.

(*i*) Although it is clear that the covenant ordinarily introduced into partnership deeds, to refer disputes to the arbitration of persons to be nominated for that purpose by the parties when the disputes arise, has no operation in excluding the jurisdiction of the Courts, and cannot be

Whether an agreement to refer future disputes to certain arbitrators named is binding.

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by them the said parties to these presents), and such third indifferent person as they the said [D.] and [E.] shall by any writing nominate to be joined with them in the said arbitration; And that they the said parties to these presents respectively, and their respective executors and administrators, shall and will from time to time, and at all times, stand to, obey, abide by, and perform the award and determination of the said arbitrators, or any two of them, concerning the premises, so as such award be made in writing under the hands of the said arbitrators, or any two of them, and be ready to be delivered to the parties in difference, or such of them as shall desire the same, on or before the expiration of —— calendar months next after the nomination of such third person as aforesaid; And further, that the parties in difference, and their respective witnesses, shall

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pleaded in bar to any proceedings relating to the matters so agreed to be referred, (*vide ante*, p. 34); yet it does not follow that an agreement to refer disputes to arise in future to arbitrators *actually named*, is equally inoperative. Such an agreement differs only from the common submission to arbitration of any particular dispute (the validity of which is in every day's experience), in the fact, that the differences to which it relates are not existing at the time, but are future; and this, it is conceived, does not vary the principle; for the inefficiency of the general partnership agreement to refer disputes seems to arise, not from the circumstance that the disputes are not actually pending at the time of the agreement, but that the arbitrators are not named; or, in other words, that the tribunal to which the parties intend to submit their differences is not constituted. If this be the case, it would seem to be an improvement in the mode of framing such clauses, to name certain arbitrators in the first instance, providing, that, in the event of their decease, or becoming unwilling or unable to undertake the reference, other persons shall be nominated in the ordinary manner. The only objection which readily presents itself to this plan, is, that such a change of circumstances may have occurred in regard to the nominated arbitrators, as to render them less eligible for the office than at the time of their appointment; but this objection has, of course, less force where the differences to be provided against will, in all probability, arise within the compass of a short period, as in the case in the text, in which the arrangement of the parties embraces the *dissolution* of a partnership, than where they may happen during a more extended period, as in the instance of the *establishment* of a partnership of a long duration.

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and will submit themselves to be examined *vivâ voce* before and by the said arbitrators, upon oath or otherwise, as may be required; and that they the said parties respectively shall and will produce unto and before the said arbitrators all such deeds, papers, writings, accounts, and vouchers relating to the matters in difference as shall be in their custody or power respectively; And also, that in case either or any of the said parties in difference shall refuse or neglect to attend the said arbitrators, or any two of them, at such time and place as they respectively shall appoint, and whereof —— days' notice in writing shall have been given to, or left at the last most usual place or places of abode of, such party or parties respectively, (he, *she, or they, having no lawful or reasonable excuse, to be allowed by the said arbitrators, or any two of them, for such neglect or refusal), it shall be lawful for the said arbitrators, or any two of them, to proceed in the same arbitration, and to make their award *ex parte;* And further, that the costs, charges, and expenses of and attending the said arbitration and award, shall be in the discretion of the said arbitrators respectively, and be paid by such party or parties in such manner and in such proportions or otherwise as they shall direct by their said award; And moreover, that these presents and the submission hereby made shall or may be made a rule of any of his Majesty's Courts of record at Westminster, at the instance of any or either of the parties in difference. IN WITNESS, &c.

Arbitrators empowered to proceed *ex parte.*

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PURCHASE DEEDS.

SPECIAL STIPULATIONS IN CONTRACTS FOR SALE RESPECTING TITLE.—AS TO AGREEMENTS THAT THE PURCHASER SHALL ACCEPT THE VENDOR'S TITLE.—WHAT IS A SUFFICIENT ROOT OF TITLE.—AS TO EVIDENCE OF EXTRINSIC FACTS.—WHETHER VENDOR OF LEASEHOLDS BOUND TO PRODUCE HIS LESSOR'S TITLE.—TITLE-DEEDS; THE CUSTODY AND PRODUCTION OF THEM; AND AS TO FURNISHING ATTESTED COPIES.—SEARCHING FOR INCUMBRANCES.

CONDITIONS OF SALE.

As to special restrictions respecting title.

IN connection with the subject of purchase deeds, it has been deemed advisable to supply a few precedents of conditions of sale, embracing, in addition to the usual stipulations, some more special provisions respecting title. The introduction of these has necessarily led to the consideration of some points, involved in the all-important question between vendors and vendees—What is a good title? To have entered at large into this question, would have extended the present article far beyond the limits which the general plan of the work has assigned to it. The utmost that has been attempted, therefore, is to offer a few practical remarks on some of the points most frequently occurring.

The expedient of introducing into conditions of sale restrictions in regard to the title that the purchaser may require, has grown, naturally enough, out of the practice which has prevailed of late years, of subjecting titles to a more rigorous course of examination than they formerly received. It was found, that so few titles, comparatively, could undergo the test of this scrutiny, and were capable of being pronounced strictly marketable, that vendors became at length awakened to a sense of the danger of entering into contracts in total ignorance of the state of the title, and of assuming too readily that, because they have derived the property by descent from their ancestor, or acquired it by purchase*, they must necessarily have

* In this instance, and throughout the present article, the word "purchaser" is used in its confined and popular signification, *i. e.* as synonymous with *vendee*.

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an unimpeachable title for the purposes of sale. The dearly-bought experience of numerous plaintiffs and defendants in suits in equity for enforcing the specific performance of such contracts, has proved the fallacy of this conclusion. If, upon the previous investigation here recommended, evidence appears to be requisite to complete the title, the vendor has an opportunity of ascertaining whether it can be obtained; and if not, of preventing, by antecedent treaty, the evidence from being required: and if (as sometimes happens) the result of the investigation be to disclose a defect endangering the actual enjoyment, and, therefore, rendering it improper for the possessor of the estate to offer it for sale upon any terms, he avoids, by this means, the risk of an unnecessary exposure.

Conditions of sale compelling the purchaser to accept a qualified title, are found to have much less effect in damping a sale than might have been expected; and even, when they go the length of providing, that the purchaser shall take any title the vendor has, (which may, in effect, mean that he is to have no title whatever), bidders are not wanting. Probably, this is partly to be attributed to the technical nature of the subject, which prevents unprofessional persons from seeing the precise extent of the danger; for if a person, entering into a treaty as purchaser, were to insist that he should not be answerable for the genuineness of the money he offers in payment, he would find few persons disposed to part with their lands or goods in exchange for so questionable a commodity; and yet, the risk to be encountered in dealing with the vendor of an estate, who says, that the purchaser shall take any title he happens to have, is not much less considerable. But, in the latter case, the danger is more obvious and familiar to the apprehension of persons in general, than in the former. In both, the fact of such a stipulation being exacted on the one side, is the precise reason why it should be resisted on the other, originating as it does in the suspicion of the party who has the best means of knowing what the money or land is.

The necessity for more caution than is usually exercised by purchasers at auctions, will strikingly appear when the result of the decisions is considered. Those decisions have established, that, if a purchaser enters into a stipulation to accept the vendor's title, such as it is, he cannot afterwards make the invalidity of the title a ground for resisting the performance of the contract. A leading case of this kind is *Freme* v. *Wright*, 4 Mad. 364, where the assignee of a bankrupt sold by auction certain real estate belonging to the bankrupt, subject to conditions of sale, one of which was in the following terms:—

Purchaser held to be bound to accept such title as the vendor had, under certain conditions.

"4. The purchaser shall have an assignment of Mr. Howard's interest in one moiety of the estate, under such title as he lately held the same; an abstract of which may be seen at the office of Messrs. Tomlinson & Co., Copthall-court; but the title deeds and leases are to remain in the possession of the proprietor of the other half share."

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The auctioneer, on putting up the estate, explained to the bidders hat it was a re-sale on account of a defect in the title, and that the assignees, having rescinded the contract, again came before the public with such title as they had; and that the purchaser was not to expect a good title, but to take it as it was*. The estate was purchased at the auction by the defendant for 550*l.*, who refused to complete the purchase for want of a good title, and brought an action for his deposit and expenses. The assignee then filed a bill for specific performance, and, upon payment of the deposit into Court, obtained an injunction restraining the defendant from proceeding in such action until the hearing.

Sir *J. Leach*, V. C.—" Every person who proposes an estate for sale without qualification, asserts, in fact, that it is his to sell, and, consequently, that he has a good title; but a vendor, if he thinks fit, may stipulate for the sale of an estate with such title only as he happens to have: and the question is, whether these particulars of sale import that the vendors asserted a good title to the estate, or meant only to sell such title as the bankrupt had. The fourth condition of sale clearly shews, that they only meant to sell such title as the bankrupt had; and states, that the abstract of the title was to be seen, so as to enable any person who wished to bid, to inform himself of the title he would acquire. It is said, the conditions of sale were not circulated before the sale, and that the fourth condition was only generally made known by the auctioneer at the sale, so that no opportunity was afforded to bidders to inspect the abstract. That is not very probable. But if the defendant desires it, he may have an inquiry as to that fact." No inquiry was pressed for; and, therefore, a decree was made for a specific performance, with a reference to the Master to inquire and state under what title Howard, the bankrupt, held possession; and the Master was to settle a conveyance according to such title; with a reservation of further directions and costs.

And the rule of course is the same both at law and in equity. And,

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Written contract not to be varied by parol.

* It will be observed, that the Vice-Chancellor decided the case upon the construction of the condition alone, unconnected with the oral representations of the auctioneer. The rule on this point is, that such representations, adding to or varying the written agreement, cannot be set up as part of the contract by either party seeking to enforce its performance against the other, but may be made a ground of defence to a suit for enforcing the written contract. But though a defendant may resist, *in toto*, the performance of a contract in writing, because it was varied by a separate oral agreement, or, in other words, because it contains part only of the actual agreement between the parties; yet, even he cannot make use of any oral declaration at the auction for the purpose of varying the terms of the written contract. *Winch* v. *Winchester*, 1 Ves. & Bea. 375.

therefore, where A. contracted to sell the next presentation of a rectory to B. for 7000*l.*, and afterwards, with the assent of B., the same vendor sold it for 7500*l.* to C., of which sum 500*l.* was to be paid to B., and C. agreed to pay the money *on having such title as they (the vendors) had received from Lord O.*; it was held, in an action brought by B. against C. for the 500*l.*, that it was not incumbent on the plaintiff to shew that Lord O. had a marketable title. "If a purchaser," said Lord *Tenterden*, "unwisely bargains to pay for such title as another has, it is his own fault if his money is placed in hazard by the insufficiency of the title." *Wilmot* v. *Wilkinson*, 6 Barn. & Cres. 511.

No relief in Equity on account of a known defect of title.

And it is clear, that the purchaser will not be relieved in a Court of Equity from the legal consequences of his contract, on the ground that the vendor had no transferable interest in the property contracted for, provided the purchaser was aware of the circumstances at the time of the contract, especially if his conduct for a series of years has denoted acquiescence.

This seems to have been the principle of the decision in *Baxter* v. *Conolly*, 1 Jacob & Walker, 576, where the facts were as follow:—In the year 1796, an agreement was entered into between the agents of the Duke of Bedford and Henry Scrimshaw, for the grant to the latter of a piece of ground, intended to form the south-west side of Tavistock-square, on a building-lease. The term was to be ninety-nine years, at a rent of a pepper-corn for the three first years, and 42*l.* *per annum* for the remainder of the time. A proposal for the lease, specifying the terms and the building conditions, was inscribed in a book kept by the Duke's agents at their office; and the following memorandum was signed by Scrimshaw, at the foot of it:—"27th July, 1796. The above proposal agreed to this day by me, Henry Scrimshaw." In May, 1800, Scrimshaw agreed to assign his interest in the premises to the defendant, who, in the year 1805, no buildings having been commenced, agreed to sell it to the plaintiff. On that occasion the following memorandum of agreement was drawn up and signed by the plaintiff:—

"Memorandum. I, the underwritten Samuel Baxter, do hereby agree with Charles Conolly, Esq., in consideration of his giving up to me all his right and interest of and in 140 feet of ground fronting Tavistock-square, by a depth of eighty feet, forming the corner of the said square, and of an intended street to be called New Frances-street, which ground was originally taken by Mr. Henry Scrimshaw of the Duke of Bedford, at the yearly rent of 42*l.*, under conditions for building thereon, &c., since vested in the said Charles Conolly, to fulfil, perform, and keep the terms and conditions mentioned in the memorandum-book kept at the Duke of Bedford's office for that purpose, in the way that is usual by persons taking ground there for building, and according to the rules of the said office; and also to well and effectually secure to the said Charles

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Conolly, his executors, administrators, and assigns, for the whole building term in the said ground, an improved yearly ground rent of 40*l.*, over and above the said original ground rent of 42*l.* payable to the Duke of Bedford, with such covenants and conditions for securing the same, clear of all deductions, as are contained in the lease of the Duke of Bedford; the said ground-rent, amounting to 82*l.*, to commence from Midsummer, 1806, the said Samuel Baxter observing the conditions aforesaid. May 18, 1805."

Under this agreement, the plaintiff paid to the defendant the 40*l. per annum* till about the year 1816; but he did not begin the building, nor did it appear that he had ever taken possession, or at least made any use of the land. Some arrears of the annual payment being due, the defendant, in Easter term, 1819, brought an action of *assumpsit* against the plaintiff for the recovery of them, and obtained a verdict. The bill in this cause, filed after the verdict at law, charged, that the defendant was not able to make any title to the premises which he had contracted to dispose of, and that, being surrounded by lands belonging to other proprietors, over which there was no right of way, they were inaccessible; and prayed that the contract might be delivered up to be cancelled, the money that had been paid by the plaintiff to the defendant refunded, and an injunction to restrain the defendant from proceeding upon the verdict, or otherwise, for recovery of the 40*l. per annum*. The defendant, in his answer, disclosing the circumstances mentioned above, said, that, at the date of the agreement, the plaintiff was well aware of the nature of his interest in the premises, and insisted that he was not entitled, according to the true meaning of the contract, to any evidence of title, or any title, except the agreement signed by Scrimshaw, and that by which Scrimshaw assigned to him; or that, if originally he had a right to call for a title, he had since waived it. A motion was now made for an injunction as prayed for.

Lord Chancellor *Eldon*.—" Whether the defendant can succeed in the action which he has brought has nothing to do with the agreement. The question before me is, whether I ought to permit him to bring any action for the recovery of the 40*l.* I state this as a case in which I have not a particle of doubt; it is no more than this, that, before 1805, the eastern side of Tavistock-square was built; to complete it there must be three other sides, and this piece of land, which was made the subject of bargain for interest or for good-will with the Duke of Bedford, is on the western side; and the habit of the Duke, and the Court must take it to be so, because it is admitted by the agreement signed by the plaintiff, is, to enter in his book the names of the persons who contract to take leases, and they agree to certain terms, which they must perform before the lease is granted. Whether the contract entered into by Scrimshaw is capable of being enforced or not, makes no difference; under it, whether it was for actual interest, or was one entitling him to the good-will of the Duke

of Bedford, certain acts were to be done before he could require a lease; he must have possession to enable him to do them, but he had no right to it, unless for the execution of those acts. After this, the defendant takes an assignment from Scrimshaw of what he has, and then he could deal with the Duke of Bedford in the same manner as Scrimshaw, and no otherwise. The defendant having the benefit of this contract or promise for good-will vested in him, enters into a contract with the plaintiff, by which the plaintiff takes off his hands, as between himself and Conolly, the obligations of the latter to perform this contract with the Duke, he having before taken from off Scrimshaw's hands, as between them, the performance of it on his part. The meaning of this contract is no more nor less than this: if you, Mr. Conolly, will put me in the same situation as yourself with the Duke, whether it be a contract for interest or good-will, I will undertake not only for the rent, but to pay you an annuity of 40*l.* a-year. This is in 1805; it may be, there is no road, but the Duke of Bedford would say, if this house is to be built in this corner, it is part of the square, and what accommodation they may have, it is for them to inquire before they enter into the agreement. From 1805 to 1816 payment is made under this agreement. Was it ever heard, after ten years, that it could be argued, that the parties who had signed the agreement, and acted on it for that time, can pretend to say they did not understand what they were about? It is said, the Duke of Bedford is not bound to grant a lease; I cannot say whether he is or not; if the terms and conditions had been performed, he would have been bound. But supposing he is not bound—and the Court certainly will not execute a contract for the sale of a good-will, at the same time it will not injoin against any proceeding at law under such an agreement. Suppose, for instance, there is a contract for the good-will of a shop; it cannot be conveyed; and the Court would say, go and make what you can of it at law; if you can recover, very well, we will not prevent you; if you cannot, very well again, we will not assist you.—The question here is, taking this as a contract for an equitable interest, or for the benefit of the honour of the Duke of Bedford, provided the party has done what he engaged to do, what right have I to restrain the defendant from proceeding at law? If he has mistaken his action, you have your defence at law; but what equity has the plaintiff to come here, at this distance of time? This is not a case in which a positive title is agreed for, but it is conditional; you are to perform certain things before a title can be asked for. I am therefore of opinion, that there is not a particle of equity in this application." This case suggests, that where a person contracts to purchase an estate, knowing the title to be defective, he should specially stipulate for a good title, unless he means to take the title as it is.

Agreement to take any title

A vendor meaning to compel the acceptance by a purchaser of any title which he happens to have, must explicitly declare such intention; and the

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not to be inferred from doubtful expresssions.

Court will not infer it from ambiguous expressions. On this principle, a declaration that the vendor has only certain deeds in his possession, does not impliedly import that the purchaser shall accept the title contained in those deeds; it only shews, that he is to have the custody of no other deeds, not that they are to constitute all his title. Thus, in the case of *Dick* v. *Donald*, in the House of Lords, 1 Bligh, New Ser. 655, where, by certain articles of roup in Scotland, a vendor contracted to execute and deliver a valid irredeemable disposition of the property, and to deliver to the purchaser certain specified instruments, adding, "which are all the title deeds of the property in his, the seller's, custody," it was held, that the title was not thereby restricted to these instruments. Lord *Eldon* observed, that he had never heard that, because the seller provides that he will give to the purchaser only certain specified deeds, the purchaser must take a bad title, or such title as appears upon the deeds.

What a sufficient root of title.

In the absence of any restrictive stipulation, the well-known rule is, that a purchaser is entitled to a sixty-years' title, and if nothing appears on the face of the deeds comprised within this period, which throws a reasonable doubt or suspicion on the anterior title, the want of the prior instruments, *though referred to or recited in the abstracted deeds*, is not material. This point, which had much divided the opinions of the profession, was decided in the case of *Prosser* v. *Watts*, Madd. & Geld. 59, the circumstances of which were as follow:—

Loss of recited deeds more than sixty years old, no objection to the title.

A conveyance, dated in 1753, under which there had ever since been an undisputed possession, recited certain prior deeds as matter of title. The vendor had not in his possession or power the deeds recited, or copies of them, and was unable to give any evidence as to what was become of them. The purchaser, for this reason, objected to the performance of his contract, alleging, that the recital affected him with constructive notice of the contents of the deeds, and that he could not safely complete his purchase without seeing that the deeds confirmed the title.

Sir *J. Leach*, V. C.—"There is no dispute that the recital of a deed is constructive notice of its contents; but to say that a purchaser is not to complete his contract unless he has the actual inspection of every deed of which he has constructive notice by recital, would lead to a practical inconvenience, which would be manifestly absurd. In some families, title-deeds are preserved for centuries; and if the earliest of those deeds† recites a former instrument, made five hundred years since, but not now existing, it would be absurd to say, that a contract is not to be enforced against a purchaser because that deed cannot be produced. There must

† His Honour here evidently assumes that a vendor's abstract commences with the earliest deeds in his possession, which bears upon a point discussed in the sequel.

of necessity, therefore, be some practical limit to the operation of this objection; and the true inquiry seems to be, in every case, whether the absence of the deed recited throws any reasonable doubt upon the title of the vendor. *Primâ facie*, it is to be presumed that the purchaser in the antient conveyance had actual inspection of every deed recited, and was satisfied with their contents; and further, it is to be observed, that it is not probable that a vendor would recite deeds which afforded evidence against his title. When there is no circumstance to repel the effect of these general presumptions, and *when the title under the conveyance which contains the recital is fortified by sixty years' undisputed possession, I think it a good practical rule to hold, that the loss of a deed recited throws no reasonable doubt upon the title of the vendor*, and that the purchaser must complete his purchase."

Semble.—A vendor bound to produce *all* the deeds in his possession.

The doctrine of this case is very important. It must not, however, be considered as deciding, that, where the vendor has in his possession recited deeds, bearing date more than sixty years ago, he is not bound to produce them, but merely, that the absence of such deeds forms no objection to the title. Indeed, it is apprehended, that a vendor in *any* case is not justified in withholding documents in his possession relating to the property sold, whatever be their antiquity, and whether subsequently recited or not. The practice does not quite accord with this statement of the rule; for, in preparing the abstract of title, the vendor's solicitor usually selects such of the deeds as shew a sixty years' title, conceiving, that it is not incumbent on him to produce or notice the prior deeds, unless the abstracted deeds refer to them. Sometimes a course still more indefensible is pursued, namely, that of suppressing intermediate deeds, which are supposed, in event, to have become immaterial to the title, as, where a mortgage has been paid off and the estate reconveyed; in which case the deeds of mortgage and reconveyance are laid aside, under the notion that the parties are placed *in statu quo* by the reconveyance, and from an anxiety to keep out of sight the circumstance of the mortgagor having incumbered the property. But the notion is often erroneous, and the practice very improper; the revocation of a will, or some other effect extremely important to the title, might have been produced by the suppressed deeds. The only fair course is, to set out all the deeds in the vendor's possession, leaving the purchaser's counsel to judge of their materiality and effect. In confirmation of the preceding remarks as to a vendor's obligation to produce the early deeds, it may be observed, that in a suit between a vendor and purchaser for enforcing the performance of the contract, under the usual reference to the Master respecting the title, the vendor is obliged, when he produces the deeds, explicitly to declare upon oath that they are *all* the deeds in his possession. Hence it seems a prudent precaution for a vendor, who has very early deeds in his possession, the production of which, even if they do not create difficulties in the title, may be

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attended with great expense, to protect himself by express stipulation against being called upon to produce them.

Whether, where a title commences with a conveyance by an heir-at-law, the ancestor's intestacy ought to be proved.

If the abstract of title commence with a conveyance by a person described as heir-at-law of the last owner, the purchaser may, it is said, require proof of the ancestor's intestacy. Sugd. Vend. 8th edit. 305. The point, however, seems doubtful; for, if the deed in which the statement is contained, is more than sixty years old, the principle of Sir *J. Leach's* decision in *Prosser* v. *Watts* strongly applies. According to that principle, it may be contended, that, since there must be some limit to the rule requiring evidence in support of recited facts, it is reasonable to say, that if the statement throws no suspicion upon the anterior title, the absence of corroborative evidence is not material. If the intestacy of the ancestor is to be proved, by parity of reasoning, the heirship of the grantor ought also in most cases to be proved; and the evidence would be requisite, as well where the title commenced two or three centuries ago, (a case which, under the rule just discussed, requiring a vendor to produce all his deeds, must sometimes happen), as where a bare sixty years' title is deduced. Besides, there is an incongruity in saying, that a sixty years' title, which leaves the purchaser totally in the dark as to its earlier history, is sufficient; but that a deduction of title for sixty years, accompanied with a statement of anterior facts, which, if true, strengthens the title, is not sufficient, for want of corroborative evidence; for statement without evidence is surely as good, at the lowest possible estimate, as neither statement nor evidence. The principle is important, not only in regard to this particular point, but in regard to other questions.

Effect of stipulations restrictive of the vendor's obligation to deduce a good title.

It seems to be generally acknowledged, that a condition restraining a purchaser from requiring the production of the title anterior to a certain period, does not preclude him from shewing an actual defect in such anterior title. Whether such a condition would protect the vendor from liability in regard to a defect known to him, is not quite clear. If there be no such restrictive stipulation in the contract, it is clear that the vendor's responsibility, even after the completion of the contract, is not necessarily limited to the covenants in the conveyance; for, if he have concealed a fact which affected the validity of the title, this is a fraud, against which, it seems, equity will give relief.

This doctrine underwent much discussion in the late case of *Edwards* v. *M'Leay*, Coop. 308, which was a suit instituted by a purchaser against vendors, claiming restitution of the purchase-money, and reimbursement of what monies had been expended in improvements†, with interest,

† In the bill, it was "repairs," not "improvements." The decree was modified on the appeal, so as to conform to the prayer of the bill. 2 Swanst. 289.

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on the ground of there being a defect of title known to the vendors, which was not disclosed by the abstract. The alleged defect was, that part of the property had been inclosed and taken from Clapham Common, in 1781, by the person who sold to the defendants. The sale by them to the plaintiff was in 1808, and the bill was filed in 1811. The judgment of Sir *W. Grant* contains a clear exposition of the principles applicable to cases of this nature, as well as a full detail of the circumstances of the case. "This is a bill," said his Honour, "of rather an unusual description. It is brought by the purchaser of an estate, who has had a conveyance made to him, for the purpose of setting aside the sale, and getting back his purchase-money, on the ground of an alleged misrepresentation with regard to the title to a part of such estate. It cannot certainly be contended, that, by the law of this country, the insufficiency of a title, even when producing actual eviction, necessarily furnishes a ground for claiming restitution of the purchase-money. By the civil law, it was otherwise. By our law a vendor is, in general, liable only to the extent of his covenants. But it has never been laid down, that, on the subject of title, there can be no such misrepresentation as will give the purchaser a right to claim a relief to which the covenants do not extend." After briefly noticing some of the cases, (which are stated in the sequel of this note), his Honour proceeded—"Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine. *But if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser.* What then is the case made by this plaintiff? He states that the vendors represented themselves to be seised or entitled in fee-simple, or to have full power and authority to dispose of the fee-simple and inheritance of the whole and every part of the premises offered to him for sale, without exception as to any part whatsoever thereof; whereas, in truth, there was a considerable part of those premises, to which the vendors had no title, or at least no other title than was derived from a possession, from about the year 1781, of what had been a portion of the waste or common of the manor of Clapham. He asserts, that the vendors knew that the part in question was an inclosure from the common, that they did not disclose the fact to him, and that he could not discover it from the abstract. He also asserts, that this part of the purchased premises is material to the convenient enjoyment of the rest. The defendants admit that they did make *such representation as is stated, with respect to the whole of the premises —they say, they do not believe that any of those premises ever did compose part of the common; but, supposing the fact to be otherwise, they deny that such fact was within their knowledge. They admit that no such fact appeared on the abstract, and they also admit the part in dispute to be material to the convenient enjoyment of the rest of the premises sold. The points, then, on which the parties are at issue, are only these two:—

Vendor decreed to refund purchase money on account of a known defect of title.

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Was this at any time a part of the common? Was it known by the defendants so to have been? I say, these are the only two points, because I do not find it asserted in the answer, that, supposing the ground in question to have been really taken from the common, the defendants have acquired, or have any means of making, a good title to it. As to the first, I think it very fully proved, that, down to about the year 1781, this piece of ground made a part of the common. Whether a little sooner or a little later is not very material; but it seems sufficiently ascertained, that it was in that year that Mr. Thornton, the then owner of the house bought by the plaintiff, for the first time separated this spot from the rest of the common. According to the usual progress of an encroachment, it was first inclosed with a slight fence or low paling, a passage across it being left open; the fence or paling was afterwards raised; and finally the whole encroachment was surrounded with a brick wall. On the other side, it is not attempted to be shewn, that, prior to the year 1781, this ground was in any way appurtenant to the adjoining house, or had been in the exclusive occupation of any person whatever. Then, as to the second point, there is a considerable body of evidence, partly direct, and partly circumstantial, tending to shew that Mr. Prescott, one of the vendors, and who acted for the rest, must have known that this had been common, and had at different times been claimed by the parish as such." The Master of the Rolls then detailed the circumstances tending to prove the plaintiff's knowledge of the encroachment, which consisted chiefly of proceedings taken by a parochial committee formed to prevent encroachments on the common, of which committee Mr. P. was a member, and there the present encroachment had been the subject of discussion, and an express resolution was passed respecting it, and the result of which was, that Mr. Prescott had so much information on the subject, as made it altogether improper and unfair to represent to a purchaser that he and the other

[*364] vendors were seised or entitled in fee-simple; *and that supposing some of the information to have been acquired, as perhaps it was, after the representation had been made, it was not fair to allow the purchaser to proceed to complete his contract, on the faith of a representation, which the vendors, at the time of such completion, knew to be substantially untrue. It was contended at the bar, His Honour observed, that the plaintiff's father, who acted as his agent in the purchase, had notice, though not from the defendants, that this ground had been a part of the common; but His Honour shewed that this related only to part of the property, which a stranger might (though the defendants could not) suppose to be in a different predicament from the rest. "The only other objection," continued the Master of the Rolls, "which the defendants make to the relief sought by the bill, is, that the plaintiff is *premature in his application, inasmuch as he has not yet been evicted, and may perhaps never be evicted. But I apprehend that a Court of Equity has quite ground enough to act upon,

Purchaser relieved in equity before eviction.

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and that it ought now to relieve the plaintiff from the consequences of the fraud practised upon him. It may be true that the commoners are barred, by having acquiesced for more than twenty years in the inclosure†. But the lord will not be conclusively barred till sixty years shall have elapsed. I have already observed, that the defendants do not pretend that there is any circumstance, from which a title in them can be inferred, supposing the fact established, that this made part of the common. Though the lord may never assert his right, is the plaintiff to be compelled to remain for twenty-five years longer in a state of uncertainty, whether, on any day during that period, he may not have the convenience of his habitation entirely destroyed? I apprehend the Court is bound to relieve him from that state of hazard, into which the misrepresentation of the defendants has brought him. There must therefore be a decree for setting aside the sale, and repaying the purchase-money, with costs. The defendants must likewise pay to the plaintiff all the expenses he has been put to relative to the sale; and he must have an allowance for any money he laid out in repairs during the time he was in possession." Lord *Eldon* confirmed this decree upon appeal, observing, " that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract." 2 Swanst. 289.

As to sales with a defective title.

This case is sufficient to put a vendor upon his guard. The practical conclusion from it seems to be, that a person, who sells with a title which he knows to be defective, ought not to content himself with declaring that he will not be called upon to produce the title for the period in which such defect arises, but should, moreover, stipulate that he shall not be considered as answerable for any defects of title that might be discovered. A stipulation of this kind might be somewhat alarming to purchasers, but honesty requires that a vendor, who sells with the knowledge of a defect, should thus far open the eyes of the person with whom he deals. Trustees, who sell under such circumstances, cannot exercise too much caution, lest they should render themselves liable to refund the purchase-money, which merely passes through their hands, in the course of its destined application, for the benefit of other persons.

Vendors not liable for unintentional misrepresentation.

But it seems that in general a vendor cannot be rendered amenable for the consequences of a misrepresentation made by him in ignorance, and therefore without any fraudulent intention. This is strongly illustrated by the case of *Bree* v. *Holbeck*, Doug. 657, where the administrator with the will annexed of a deceased person, finding among his papers a mortgage deed for securing the sum of 1200*l.* and interest, in 1773, assigned it in consideration of that sum to A., covenanting that neither he nor the deceased had

† See *Hawke* v. *Bacon*, 2 Taunt. 156; *Creagh* v. *Wilmot*, Id. 160, n.

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done any act to incumber. The mortgage deed turned out to be the forgery of an attorney. In the year 1781, A. brought an action against the vendor for the recovery of the 1200*l.*, but it was held that he was not entitled to recover. Lord *Mansfield*, C. J., said, "The basis of the whole argument is fraud; and the question is, whether fraud is any where asserted in this replication. There may be many cases where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent; as in the case of Sir *Crisp Gascoyne*, who insured a life, and affirmed it was as good a life as any in England, not knowing whether it was or was not. There may be cases too, which fraud will take out of the statute of limitations; but here every thing alleged in the replication may be true, without any fraud on the part of the defendant. He is an administrator with the will annexed, who finds a mortgage deed among the papers of his testator, without any arrears of interest, and parts with it *boná fide*, as a marketable commodity. If he had discovered the forgery, and then got rid of the deed as a true security, the case would have been very different; he did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate,—it was incumbent on the plaintiff to look to the goodness of it."

In strict accordance with the principle of the last case, is that of the more recent case of *Early* v. *Garrett*, 4 Mann. & Ryl. 687, where the assignees of a bankrupt sold a piece of ground belonging to him, undertaking to convey it to the purchaser, his heirs and assigns, but with an express stipulation that they should not be obliged to warrant the title, the purchaser having agreed to take it with all its defects. The purchaser asked if rent had ever been paid, and the vendors told him that neither the bankrupt nor themselves had ever paid rent. The fact proved to be that the bankrupt had paid rent; and the lessor, the rent being in arrear, recovered the possession from the purchaser; in consequence of which the latter brought an action for money had and received against the assignees, but failed, on the ground that the defendants were not acquainted with the falsity of the statement they made. Mr. Justice *Bayley* observed, "a fraudulent concealment is as bad as a wilful misrepresentation; and, if made of a fact which the seller ought to communicate, would undoubtedly vitiate the sale, *but in order to have that effect, the concealment must be fraudulent.*"

Purchase-money recovered for a defect of title.

Purchase-money was held to be recoverable on the ground of mistake, in the case of *Cripps* v. *Reade*, 6 Durn. & East, 606, where A., having obtained administration to the effects of a deceased person by a wrong name, sold a leasehold property belonging to the intestate to B., and received the purchase-money, but executed no assignment, promising, however, orally, that "if any thing happened he would see B. righted." Administration was afterwards taken out in the deceased's right name by

another person, who evicted the purchaser from the property in question; and the latter thereupon brought an action against A. for money had and received, and recovered a verdict which the Court allowed him to retain. Lord *Kenyon* distinguished this from the case of *Bree* v. *Holbeck*, as the whole passed by parol, and it proceeded upon a misapprehension by both parties, that the defendant was the legal representative of the lessee, though it turned out afterwards that he was not. As, therefore, the money was paid under a mistake, an action for money had and received would lie to recover it back. In the case cited, *Bree* v. *Holbeck*, no action at all could have been maintained.

As to restraining purchaser from requiring evidence of facts anterior to a given period.

Another point deserving consideration in framing conditions of sale, is, whether the purchaser should not be restrained from calling for evidence of extrinsic facts, as heirship, intestacy, death, &c., which are recited or taken notice of in deeds of a certain antiquity. The strict rule, it is conceived, is, that the purchaser is entitled to require evidence of all facts material to the title, whether stated in deeds or not, occurring during the *period for which an adverse claim might be sustained, *i. e.* for sixty years. [*366] Such a rule, it is obvious, must often involve the vendor in great difficulties. A case has occurred, within the observation of the Editor, in which a considerable part of the purchase-money was absorbed by the expenses of collecting evidence of the heirship of certain persons who conveyed as co-heiresses of the last owner, in 1780, so large was the body of evidence requisite in order to establish the relationship between the parties and the deceased. To prove a person standing in the relationship of second cousin to be heir, no fewer than six marriages, six baptisms, and two deaths, at the least, must be proved, besides the failure of the lineal descendants of the ancestor, and the non-existence or extinction of any elder collateral branches of the issue of the several persons through whom, either in the ascending or descending lines, the pedigree is to be traced†. If the

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What amounts to evidence of heirship.

† Where a person deduces his title as heir general at common law of his father, the evidence required is not only that he is the legitimate son, but the eldest or only son of his parent. Certificates of his parents' marriage, and of his baptism, it is obvious, proves only the former fact; and some evidence should be adduced in support of the negative allegation, that there was no elder son, particularly if, upon the comparison of the dates of the marriage and birth, it seems that the interval between them was such as to render it *probable* that there was an elder child, that is, if it exceeded twice the ordinary period of gestation, though the fact that less than such a period intervened is not conclusive in favour of the heirship, as there might have been twins, or the eldest child might have been born, but not procreated, after the marriage. If the alleged heir be a daughter, the negative evidence of course should extend to the fact of her being the

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property has become distributed among numerous coparceners (which happened in the case just alluded to), the amount of evidence may be greatly augmented, and the want of any one link in the pedigree is a fatal *defect. It is not surprising, therefore, that vendors should be anxious to negative the purchaser's claim to evidence, the procuring of which is attended with so much expense and difficulty. If the title has been investigated before the sale, the period of negation should be adapted to the circumstances of the title; if no such investigation has taken place, thirty years are generally fixed as the lapse of time after which proof of a fact is to be dispensed with, probably by a kind of analogy to the rule (with which, however, it has no necessary connection), that a deed or will thirty years old proves itself, so as not to require that evidence should be given of its execution. *Doe* d. *Oldnall* v. *Deakin*, 2 Mann. & Ryl. 195. It is sometimes supposed that recitals in an instrument of this age possess a degree of weight as evidence, which does not belong to statements in those of a more recent date; but this is clearly a mistake. Recitals are *never* evidence as against persons who are not parties to the deed; though, where they are supported by long uninterrupted possession, and relate to facts which must have been within the knowledge of the parties, especially if those facts are stated with the circumstances of time, place, &c., they may often safely be relied on. No general rule, however, upon the subject can be laid down. A sound discretion must be exercised in each particular case. The doctrine was discussed in the case of *Fort* v. *Clarke*, 1 Russ. 601, which was as follows:—

As to recitals being evidence.

Recitals in a deed of 1793 not sufficient evidence of pedigree.

A., by his will, dated in 1732, devised his estate at L., after the decease of his wife, and subject to the payment of two sums of 100*l.*, which the trustees were empowered to raise out of it, to his second son John Cormick, for life; remainder to the first and other sons of John in tail

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only child; as a son, whether older or younger, would take precedence, and a daughter, whether older or younger, would be entitled to an equal share.

Perhaps, in this place, may conveniently be noticed a defect of title, which sometimes arises from a circumstance that does not appear on the face of the abstract, namely, that one of the parties, through whom the title is deduced, is an alien. The attention of the conveyancer is only attracted to the point when the name or address is evidently foreign; and yet it is obvious that John Smith, of Cheapside, London, or any other person whose name and description would equally fail to excite suspicion of his not being one of his Majesty's liege subjects, might turn out to be a foreigner; he might not have been an Englishman either by nativity or parentage. This often occurs in the case of illegitimate children, who, being *filii nullius*, are necessarily aliens, if born out of the British dominions.

male; remainder to the daughters of John in tail general; remainder to his own right heirs. A. died not long afterwards, and his widow died in 1747. Default having been made in the payment of 200*l.* charged upon the lands, the trustee, in pursuance of directions contained in the will, entered into the receipt of the profits; and, in 1750, he raised what remained unsatisfied of the 200*l.*, by mortgaging the lands for a term, for a sum under 100*l.* There was no evidence that, from that time till 1793, any of the persons who would have been entitled under the will dealt with or exercised any right over the property. In 1793 the property was treated as belonging to certain persons of the names of Wetter and Gibbons, resident in Bermuda, who claimed as heirs of the bodies of two daughters of John Cormick; and, in the same year, they, by deeds of lease and release, reciting the devolution of title to them under the will, in consequence of the death of the sons of John Cormick without issue, and by a fine and common recovery, conveyed the premises to Brickwood in fee. The mortgage term was then outstanding; and Brickwood afterwards obtained an assignment of it from the personal representatives of the mortgagee. From 1793, the possession had remained, unchallenged and undisturbed, in Brickwood and those claiming under him.

On a reference of title in a suit for specific performance, instituted by *the vendor, evidence was adduced to shew that Wetter and the Gibbonses [*368] were the heirs of the body of the two daughters of John Cormick the son, and that all his other children died without issue. That evidence consisted principally of affidavits concerning the state of the family, made at Bermuda in 1766, and afterwards in 1785, with a view to measures, which were in contemplation at those two periods, for the recovery of the property. The affidavits, however, and the documents which were offered in addition to them, were altogether unsatisfactory. The vendor then placed his title on this ground—that, under the circumstances of the case, he was not bound to establish, by extrinsic testimony, the truth of recitals in the deeds of 1793, which set forth the pedigree of Wetter and of the Gibbonses, and purported to trace the devolution of title to them under the original will. The Master having certified against the title, the question came before the Court on exceptions to the report.

Lord *Gifford*, M. R.—" It has been contended that the recitals in the deeds of 1793 ought to be received as sufficient evidence of the pedigree of the parties who then conveyed to Brickwood. These recitals, whatever effect they may have against the parties to the deeds, cannot, as against third persons, be any evidence of the pedigree. If evidence had been given that possession had followed and accompanied the pedigree; if, between 1747 and 1793, a possession had been shewn passing from parent to child under the entail created in 1732; that enjoyment would have been a strong circumstance to prove that the persons named in the pedigree did, in fact, fill the characters which it was, in 1793, alleged that

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they did fill. In 1766, affidavits were made with a view to enforce the claim of the daughters through whom the plaintiff derives title; and, in 1785, fresh affidavits with respect to the state of the family were made for the same purpose. On neither occasion, however, was the claim enforced, and there is not the slightest proof of any possession, from 1747 to 1793, in those through whom the title is now traced; it does not even appear how the possession was ultimately obtained. With nothing but the recitals of the deeds executed in 1793, the conveyance to Brickwood, and the subsequent enjoyment under that conveyance; with no proof of the pedigree on which the title depends, or of possession from 1747 to 1793, according to that pedigree; I cannot say that the Master has drawn a wrong conclusion, and that this is a title which a purchaser can be compelled to accept."

Whether the vendor of leaseholds is bound to produce the lessor's title.

As to the much litigated point, whether the purchaser of leaseholds is entitled to call for the production of the lessor's title, see Sugd. Vend. & Purch. 8th ed. 305. The case of *Fane* v. *Spencer*, 2 Mer. 430, n., decided, that the purchaser of a *bishop's* lease was not entitled to call for the lessor's title; but, according to subsequent decisions, this must be considered as an exception to the general rule; that rule being, that the performance *of a contract cannot be enforced by a vendor, who does not produce his lessor's title. This point, after much consideration, was so decided in the case of *Purvis* v. *Rayer*, Sugd. Vend. & Purch. 8th ed. 310; *S. C.* 9 Price, 488; which was as follows:—An agreement was entered into on the 15th of May, 1819, between J. G. Ravenshaw, (as the agent of Purvis), of the one part; and Rayer, of the other part; whereby Ravenshaw agreed to sell, and Rayer agreed to purchase, a house in Bath, held for the remainder of a term of years, under the corporation of Bath, and the late Richard Attwood, at the sum of 1,500*l.*; (the term commenced in 1774); an abstract to be made and delivered by Purvis, and the assignment to be at the expense of Rayer. The purchase-money to be paid on or before Midsummer, when the deeds were to be signed. The ground-rent and all outgoings to Midsummer, to be paid by Purvis, from whence the same were to be paid by Rayer. The bill was filed *by the seller*, and the title was referred to the Master; who reported that the plaintiff could not make a good title. The report was grounded on the non-production of the lessor's title. The plaintiff excepted to the report. Lord C. Baron *Richards* overruled the exception. His Lordship observed, that the question was, whether, when a man sells a leasehold estate, he could compel the purchaser to take it, without shewing him his title. *White* v. *Foljambe*, 11 Ves. 339, was the first case on this point. There was no case that went the length of shewing, that a lessor is not bound to shew his title. This was a lease from a corporation; and the general rule is, that where a vendor offers any thing for sale, the vendee is entitled to have the thing he buys, with a moral certainty that he has the

Contract cannot be enforced by a vendor, who does not produce his lessor's title.

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thing he buys. If a man sell an inheritance, he must shew a title to the inheritance; so, if a life estate. Then, what is the difference where a lease is sold? It is said, however, that this is an anomalous case; but the law has not said so, nor has it been so considered in any of the decided cases. Then it is objected, that a lessee has not the means of compelling the inspection of his lessor's title; that is true, but furnishes no ground for an exception. A lessee may insist on looking into his lessor's title, or that he should produce it; but if he omits to do so, is that any reason why the vendee of a lease should be deprived of those advantages? Another course is, to state in the advertisement that you cannot shew the title. Therefore, though, after the lease is granted, the lessee cannot compel the production of his lessor's title, there is no reason why the vendee should be put to any risk. Then is there a good title here? The lease is made in 1774, does the length of time make the lease good? Suppose it had been made by a tenant for life; a tenant for life might live for forty-five years; forty-five years' possession would not be good evidence of a title to the inheritance; but then it is said, this was a lease by a corporation. His Lordship was of opinion, that there might be circumstances which might make an alteration; but here there was no act of ownership prior to 1774, no prior leases. A tenant for life might have conveyed in fee to a corporation; but, on the death of a tenant for life, *the estate would cease. This case, therefore, did not differ from the case of a lease from an individual.

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Mr. Price's report of this case contains a similar, but more diffuse statement of the grounds of the decision. One of the doctrines advanced by the Lord Chief Baron is open to observation. In regard to the lapse of time since the commencement of the lease, his Lordship is made to say, "The lease itself, which was the subject of the contract, was made in 1774, forty-five years since. That is certainly a very long time ago, but that does not make the lease good for any alleged residue of a term, if the lessor had no title to the premises, nor gives any right to the lessee, nor does it in any way affect the contract, so as to deprive the purchaser of his natural right to see that he is really buying what was represented to be meant to be sold. Suppose the lease had been made by a tenant for life; the length of possession in that case could not be urged as evidence of a good title, or to shew that the term will continue for any given length of time beyond. *Time of enjoyment, therefore, does not give any greater credit or stability to a claim under a lease of a continuing enjoyment to a future period.* This case is, in that respect, like the common one of incumbents, who are entitled to tithes, receiving successively, for a great number of years, a sum of money as a composition. In such a case, the lapse of one hundred, or one hundred and fifty years, does not give any adverse right against the tithe owner. If this had been an estate of inheritance, forty-five years' possession would not be enough in general, without other

Observations upon *Purvis* v. *Rayer*.

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circumstances, to furnish an indefeasible right; still less in the case of a lease, whose length of possession is not of such weight."

Operation of length of time upon a leasehold title.

It is submitted, however, that though the learned Chief Baron may have been perfectly right, in holding, that a purchaser ought not to be compelled to take a lease granted forty-five years ago, without an opportunity of investigating the lessor's title, yet it is impossible to accede to the proposition, that length of possession under a lease affords no presumption in favour of its validity. Suppose a lease for five hundred years were granted a hundred years ago, under which there has been undisturbed enjoyment ever since, can it be contended that such enjoyment raises no stronger presumption, that the lease was granted by a person possessed of competent authority, than if the enjoyment under it commenced yesterday? If granted by tenant for life, or any other person having a temporary interest only, it is probable that such interest would long since have ceased, and that the remainder-men would have presented themselves with their opposing claims. Besides, how far is such a case distinguishable from that of a freehold title? If an abstract commences with a conveyance in fee, made more than sixty years ago, such a conveyance is admitted, on all hands, to be a sufficient root of title, though there is nothing on the face of the deed disclosing the means by which the grantor became entitled to the inheritance; indeed, it is preferred, that the instrument should contain no recital.

[*371] Now, it is obvious, that the *grantor in this conveyance may have been tenant for life only, and may have died very recently, or may be even yet living; so that there may have been no possession adverse to the right of the remainder-man; and the case is therefore within the scope of the learned Chief Baron's reasoning. It has been thought, however, and wisely thought, that an enjoyment for sixty years, under an instrument professing to grant the fee, raises a reasonable inference, that the grantor had power to make such conveyance; and the same inference, it is apprehended, arises in favour of a leasehold title, though, perhaps, not with quite equal force, because lessees are not so much in the habit of scrutinizing the titles of lessors, as the purchasers of the fee-simple are those of vendors; which difference, however, let it be observed, is diminished in proportion as the lease is long and beneficial. Whether this consideration will lead to the establishment of a different rule, in regard to leaseholds, remains to be decided. If sixty years uninterrupted possession under a lease is not to be considered as conclusive evidence of the right of the lessor to grant it, then an enjoyment of a century would be equally inconclusive; for it seems impossible to draw an intermediate line.

But though equity will not entertain a suit for specific performance by a vendor, who cannot produce his lessor's title; yet, on the other hand, it is unable to enforce such performance against him, at the instance of the purchaser, as the act required to be performed is not in the vendor's power, but depends upon the will of a third person. To decree, therefore, that

he shall specifically perform the contract, by producing the lessor's title, must necessarily have the effect, unless he can obtain the lessor's compliance, of sending him to the Fleet for life. The purchaser, consequently, is reduced to this alternative: he must either dispense with the production of the lessor's title, or abandon the contract altogether; and that too, it seems, with the loss of any deposit he may have paid; for it has lately been ruled at *Nisi Prius*, that a purchaser is not entitled to recover his deposit, on the ground of the non-production of the lessor's title. *George* v. *Pritchard*, cor. Lord *Tenterden*, 1 Ryan & Moody, 417.

Deposit not recoverable by purchaser for non-production of the lessor's title.

It does not appear to have been distinctly decided, whether a person contracting for a lease is entitled to call upon the intended lessor to produce his title. Sir *W. Grant*, in *Fildes* v. *Hooker*, 2 Mer. 427, said, "I should hesitate long before I decided, that an owner of real property does, by contracting to grant a lease, become bound to shew the title to the estate out of which it is granted." But the point did not arise in the case before his Honour. It is clear, however, that the contract will not be enforced against the intended lessee, without the production of the lessor's title, though the lease was to be at rack-rent; "for, it has been truly observed, that that which, at the commencement of the term, was a lease at rack-rent, may, from various circumstances, become a beneficial lease before the end of the term."—*Per* Sir *W. Grant*, in *Fildes* v. *Hooker*, 2 Mer. 428.

Whether person contracting to take a lease can compel the lessor to produce his title.

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*The destination of the title deeds is a subject to which the attention of a person preparing conditions of sale will necessarily be directed. If the vendor has in his possession all the deeds of the estate, and they relate to that alone, he has nothing to do but to hand them to the purchaser, and no special stipulation is necessary. This, however, is often not the case. The deeds either relate to other property, which is to be retained by the vendor, or which is about to be sold at the same time, or which he has sold on some former occasion, when he covenanted to produce the deeds to the purchaser. In the first of these cases, it should be stipulated that the vendor shall retain the deeds, on his covenanting to produce them at the purchaser's expense. In the second, it is usually provided, that the deeds shall be given up to the largest purchaser, on his entering into covenants for their production, with the other purchasers, at the expense of the latter. In the last case, the only obstacle to the delivery of the deeds is the covenant already entered into for their production; and this is so little regarded in practice, that nothing is more common, than for persons, who have, on the sale of parts of their estate, retained the title-deeds, covenanting absolutely for their production, to deliver up the deeds on the sale of the remainder to the purchaser, without taking the slightest precaution against the effect of their former covenant, which they have thus deprived themselves of the means of performing. The hazard attending this course is obvious. If the covenantor be called upon to produce the deeds, in pursuance of his covenant, he is totally unable to comply, unless he can ac-

As to the destination of title deeds.

Danger of parting with deeds after having covenanted to produce them.

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complish it through the favour of the person to whom he has delivered the deeds, and whom he has laid under no obligation to produce them. The covenantor, failing to perform his covenant, is of course answerable to the covenantee for any extent of damage he may have sustained by the non-production of the deeds, and which, in some cases, it is obvious, might be very considerable. Such actions are certainly not common, which in some degree accounts for, though it does not warrant, the total neglect of precaution. The infrequency of suits to enforce the production of deeds is probably in a great measure owing to the circumstance, that the arrangements for the production of them are usually effected through the solicitors of the parties, who, from professional courtesy, and because the furnishing copies of deeds in their possession is an ordinary source of emolument, generally produce the deeds, and give copies, without very scrupulously inquiring into the applicant's right to demand them, unless there is reason to apprehend danger to their client's interests, by the exposure of the contents of the deeds; and even then, if there is a covenant for their production, the reluctance to produce them must yield to the obligation. If these facilities did not exist, the inconvenience attending the present practice would be sorely felt; and even now, a vendor should not be advised to part with deeds, which he has covenanted to produce, without obtaining from the person to whom he delivers them a covenant for their production,

[*373] so *as to enable the covenantor to perform his engagement; or (which is much better), he should endeavour to prevail upon the covenantee to cancel the existing deed of covenant, and accept the covenant of the person to whom the deeds are about to be delivered, in its stead.

As to the qualification usually introduced into trustees' covenants to produce deeds.

In the case of trustees, it is usual to insert a proviso in covenants for the production of title deeds, making them void in case the covenantor shall part with the deeds, and shall procure the person to whom they are delivered to enter into a similar covenant. And, in strictness, every covenant, even by a beneficial owner, should be qualified in a similar manner, as he seldom intends to retain the deeds longer than he holds the property. It is doubtful, however, whether a purchaser, without an express stipulation, would be bound to accept of a covenant so limited; particularly if the expense of the substituted covenant were to be thrown upon him; and as such substituted covenant ought, upon the same principle, to contain a similar qualification, the expense would be without end, as a similar operation must be gone through at every successive transfer of the property, and consequently of the deeds. A person, whose portion of the property to which the deeds related was not large, would probably forego the advantage of having any covenant for production, rather than purchase it upon such terms; and a covenantor, who had to find out the persons for the time being interested in the property under the covenantee, and give them notice, (which at least he would be bound to do), that he was about to part with the deeds, in order that they might tender a deed

of covenant to the new custodian of the deeds, would have no enviable task. Such are some of the inconveniences attending the existing state of the law respecting title-deeds, and they have been justly urged by the advocates for the establishment of a general registry, now under the consideration of Parliament, as strongly illustrating the necessity of making more effectual provision than at present exists for insuring the preservation of, and free access to, documents of title. How far this advantage would be counterbalanced by the evils necessarily attendant on such a measure, is a question on which the opinions of professional men are divided, and which this is not the proper place to discuss. *Our* attention is rather to be directed to consider what is the operation of the *existing* system, and by what means the evitable inconveniences, resulting from that system, can be best avoided. The precaution to be suggested, in the present case, is, that, in preparing conveyances of property, whether for the purposes of sale, mortgage, or settlement, care should be taken to avoid, as much as possible, including in the same deed several properties, which, at a future period, are likely to be held by distinct proprietors; and to have a separate conveyance, mortgage, or settlement of each property. When this is practicable, the advantage attending it, in regard to future dealings with the property, is cheaply purchased by the cost of an additional deed. The practice of including several estates in the same mortgage is *often productive of great inconvenience. If part of the property happens to be sold while the mortgage subsists, the mortgagee is of course a necessary party to the conveyance, and is required to covenant for the production of the mortgage deed, which he declines to do, unless with a restriction confining the covenant to the period of his continuing to be mortgagee, which the purchaser is not bound to accept, (*vide* 1 Sim. & Stu. 451); or, if he enters into an absolute covenant, he alleges this covenant as a ground (which it fairly is) for claiming to retain the mortgage deed when his mortgage is paid off; and the mortgagor is obliged either to submit to such retention, or to procure the covenantees to accept his (the mortgagor's) covenant, in exchange for that of the mortgagee. In a case that recently occurred, in which a mortgagee had, at the instance of the mortgagor, joined in the conveyances of numerous portions of the property to purchasers with whom he had covenanted to produce the deeds, the mortgagor was obliged, in order to induce the mortgagee to deliver up the deeds, on the liquidation of the mortgage debt, to go round to all these purchasers, and prevail upon them to exchange the mortgagee's covenant to produce for a similar covenant by himself.

Inconvenience of conveying several properties by the same instrument.

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Inconvenience of including several estates in the same mortgage.

Whether a person who has the possession of title deeds can be compelled to produce them at the instance of the persons interested in the property to which they relate, is *vexata quæstio*. Even if it be clear that an equitable right to call for the production of the deeds exists, it is equally clear, that

Whether there is an equitable right to enforce the production of deeds independently of contract.

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a purchaser is not compellable to rely upon it, but is entitled to a covenan for the production of all deeds material to the title, which are not placed in his possession; and the circumstance that he cannot have either the deeds or such a covenant, affords a sufficient ground for resisting the performance of the contract†. Thus, in a late case, it appeared that the property in question was held under the same title as certain hereditaments which had been formerly sold to a Mr. John Thring, about the same time that the property in question was sold to Mr. George Barclay, under whom the plaintiffs derived their title; upon the sale to Thring, the title deeds to the premises purchased by him, which also related to the premises purchased by Barclay, were delivered to him, and he executed a deed of covenant to the then vendors, dated 12th July, 1797, to produce them, in the usual manner; an attested copy of this deed of covenant was delivered to Mr. George Barclay by his vendors, and was, at the time when the Master made his report, in the possession of the plaintiffs. This attested copy was produced before the Master, who found that a considerable part of it was destroyed, and that the names of the attesting witnesses were decayed, torn, or obliterated. No deed of covenant was given to Mr. Barclay for the production of the title deeds. The original deed of covenant had *since been lost; inquiries had been made for it, but without effect, and no hopes were entertained that it would be found. John Thring sold his part of the property to Mr. Slade, under whom Messrs. James and John Slade, the present proprietors of it, claimed to be entitled. Application had been made by the plaintiffs to Messrs. James and John Slade for a new deed of covenant to produce the title deeds; but they refused to give it. It appeared, that, upon the sale by Thring to Slade, part of the purchase-money remained on mortgage, and the title deeds were, therefore, left with Thring, in whose hands they still remained. The plaintiffs applied to Mr. Thring for a covenant to produce, and he accordingly executed a deed of covenant, dated the 29th of October, 1822, by which he covenanted with the defendant Raine to produce the deeds *whilst he should continue mortgagee*. Raine objected to this deed as insufficient, and therefore Thring executed another, dated the 18th of January, 1823, by which he acknowledged the execution by him of the original deed of covenant of the 12th of July, 1797; and also, that the several title deeds mentioned in the schedule to the original deed of covenant were, at the date of this last deed, in his possession. Copies of these two deeds of covenant, of the 29th of October, 1822, and the 18th of January, 1823, were delivered to the defendant's solicitor before the filing of the bill. The defendant, when he agreed to purchase, had no notice that the plaintiffs

Purchaser not bound to rely on such right, if it exists.

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† As to enforcing the contract where the deeds have been destroyed, *vide Bryant* v. *Busk*, 4 Russ. 1.

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could not deliver the original title deeds to him. Under these circumstances, the Master stated his opinion to be, that the plaintiffs ought to procure a deed of covenant from Messrs. James and John Slade, for the production of the title deeds. The question was afterwards brought before the Court. Sir *J. Leach*, V.C.—"A Court of equity never compels a purchaser to take without the title deeds, unless he has a covenant to produce them; *and a right in equity to compel the production of the deeds, even if it existed, would be no answer.* But the equity of the purchaser, in the present case, would be highly questionable. Thring's covenant to produce does not run with the land†; nor is it pretended that Slade had notice of that covenant; and Slade, like every other proprietor, has a material interest against the exposure of his title deeds." *Barclay* v. *Raine*, 1 Sim. & Stu. 449.

Purchaser entitled to a covenant for the production of title deeds.

On what ground his Honour thought that the right to enforce the production of the title deeds had been excluded in this case, does not distinctly appear. That he did not intend to deny the existence in general of such an equitable right, is evident from his observations *in the subsequent case of *Fain* v. *Ayers*, 2 Sim. & Stu. 533; the circumstances of which were briefly as follow:— [*376]

In 1818, B., the defendant, sold and conveyed a piece of ground to A., he (B.) retaining the title deeds, but not covenanting to produce them; this conveyance, however, contained the usual covenant for further assurances. A. had since sold the ground, and being unable, as he alleged, to make a marketable title, for want of a covenant for the production of the deeds, he filed a bill against B, praying that he might be compelled to produce, or to execute a covenant to produce them, the plaintiff offering to pay all reasonable charges. The defendant put in a general demurrer. It was insisted for the plaintiff, that, under the covenant for further assurance, the plaintiff had a right to call upon the defendant to execute a covenant to produce title deeds, as being a further assurance.

Whether vendor, under his covenant for further assurance, is bound to execute a covenant to produce title deeds.

The Vice-Chancellor seemed inclined to think that the case made by the bill was not sufficient, but ordered the demurrer to stand for judgment. But, on a subsequent day, his Honour said, "I do not think that there has been a judicial decision upon the particular point, whether, under a covenant for further assurance in a conveyance, a new deed of covenant to produce title deeds may be required. But, whatever doubt there may be upon that point, this bill, stating that the plaintiff has re-sold the property,

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† His Honour lately denied his having used the expression here imputed to him. He did not say that Thring's *first* covenant did not run with the land (for his Honour thought that it clearly did), but that the *second* covenant was restricted to the period of his being mortgagee. Rolls, 28th July, 1830.

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prays alternatively, either a new deed of covenant to produce, or the actual production of the title deeds, to enable the plaintiff to shew a marketable title upon his re-sale. The defendant's title deeds being the root of the plaintiff's title, and, in that sense, a sort of common property, *I strongly incline to think, that the plaintiff has an equity to that extent;* and I am informed, that the Lord Chancellor has expressed an opinion to that effect."

It was not attempted to be maintained, in this case, that, independently of contract, a party interested in the deeds (whatever right he might have to enforce their production) could call upon the person having the deeds to enter into a covenant for their production.

Purchaser held to be entitled to have counterpart of lease deposited.

If a person purchases property which has been leased in the same deed with other lands, he is entitled to require that the counterpart be deposited in the hands of a third person for the benefit of himself and the other lessors. Thus, in *Shore* v. *Collett*, Coop. 234, certain estates were sold by auction, and it was stated in the particulars of sale, that the premises were on lease; and that the lease contained covenants to repair and deliver up the premises in proper repair at the end of the term. It turned out, that the counterpart of the lease was in the possession of the devisees of a Mr. Foskett, who was seised in fee of an undivided share in the demised property when the lease was granted, and whose devisees had since received an allotment in lieu thereof, on a partition of the property. The Master, in his report upon the title, stated, that the purchaser, having required an attested copy of the lease, with a covenant for the production of the counterpart, the vendors *had applied to Mr. Foskett's executors, and requested them to deposit the counterpart in the hands of some banker, in the names of four or five of the persons who were, or might be, interested in it; which they had declined to do, but had enrolled it in the Common Pleas for safe custody. The Master then reported, that it appeared to him that the plaintiffs had not then acquired to themselves the means of assuring to the defendant the production of the counterpart of the lease, or any sufficient evidence of its contents; though he considered this as not raising an objection to the title. To this report, the defendant excepted, upon the ground that the Master ought to have reported that the objections were valid objections to the title. These exceptions were over-ruled by the Vice-Chancellor. The point was afterwards brought before Lord *Eldon*, when his Lordship said, he was of opinion that the counterpart of the lease not being in the possession of the plaintiffs, was not an objection to their title. It was in the possession of one of the parties to the partition. No doubt the parties entitled to the other shares would be entitled to the production of the counterpart of the lease, in order to enable them to proceed against the tenant, if necessary. *But, unless the deed was deposited, he would not compel the purchaser to take under one of the lessors.* It would be too much to put the purchaser to the necessity of filing a bill

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from time to time to have the counterpart delivered to him as often as he might want it.

Vendor bound to furnish attested copies.

Every contract for sale now contains, as a matter of course, a stipulation that the purchaser shall be at the expense of attested copies; otherwise, the vendor is bound to furnish attested copies of all deeds which are not delivered up; *Boughton* v. *Jewell*, 15 Ves. 176; and this, where they are numerous, occasions a heavy expense, especially if the estate has been sold in many lots to different purchasers†, for each purchaser would be entitled to copies. In a case where an estate had been sold in 144 lots, Lord *Eldon* was of opinion, that each purchaser was entitled to copies; observing, however, that purchasers have set a value on these attested copies, which does not belong to them. They are waste paper upon an ejectment, unless between the parties themselves. *Dare* v. *Tucker*, 6 Ves. 460.

For what period they should be furnished.

But it is found, that the anxiety of purchasers to be furnished with attested copies is considerably diminished when the expense is to be borne by themselves, and not unreasonably, since they can always procure such copies under the covenant for production, upon similar terms. It is observable, that, in *Dare* v. *Tucker*, Lord *Eldon* appears not to have required copies to be supplied of all the deeds, " but only so far back as to make a title;" meaning, *no doubt, a sixty-years' title. Perhaps it is difficult to [*378] draw the line here, consistently with the doctrine which has been already discussed, (*vide ante*, p. 360), that a purchaser is entitled to have an abstract of all the deeds in the vendor's possession.

The rule entitling the purchaser to attested copies at the vendor's expense does not apply to instruments on record; *Campbell* v. *Campbell*, Sugd. Vend. & Purch. 466; though, even of these, it may sometimes be necessary for the vendor to obtain copies, for the purpose of enabling the purchaser to ascertain the correctness of the abstract. This observation applies particularly to wills, as the officers of the Prerogative Court will not allow the abstract to be compared with the original will, which is in their possession.

Purchasers from assignees entitled to have the proceedings enrolled.

Purchasers from assignees in bankruptcy are entitled to have the commission, depositions, and proceedings under it, so far as they are material to the title derived under the bankruptcy, enrolled. The requisition is sometimes rather reluctantly submitted to; but the purchaser's right seems to be clearly admitted in the stat. 5 Geo. 2, c. 30, s. 41, which recites, that " commissions of bankrupts, and the depositions taken before the commissioners of bankrupts, and the proceedings upon such commissions, are most commonly kept by such persons as act as clerks or secretaries to such commissioners, and, by reason of the death of such clerks or secretaries,

5 Geo. 2, c. 30, s. 41, directing the enrolment of proceedings in bankruptcy for the security of purchasers.

† I am not aware that the rule has ever been carried so far as to entitle a person purchasing several lots to a set of copies for each lot.

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are many times lost and mislaid, by means whereof *such persons as have or may purchase any messuages, lands, tenements, or hereditaments, under any commission,* may be disabled to make out their right and title to the same; and there being no certain place where the creditors of any bankrupt, or any person or persons claiming any estate or interest in any messuages, lands, tenements, or hereditaments, by or under any such commission as aforesaid, can have recourse to such commission and the proceedings thereupon; and such commissions, depositions, and proceedings, in case they can be produced, are not at present of record, nor can be given in evidence, *which may be of very evil consequence to such purchasers,* or persons claiming as aforesaid:" it is then enacted, that, upon the petition of any person or persons praying that the commission, depositions, &c., or any part of such depositions, &c., may be entered of record; the Lord High Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, shall and may direct and order the commissions, depositions, proceedings, &c., to be entered of record; and in case of the death of the witnesses proving such bankruptcy, or in case the said commissions, depositions, proceedings, or other matters or things, signed and attested as thereinafter is mentioned, should be lost or mislaid, a true copy of the record of such commission, &c. shall and may, upon all occasions, be given in evidence to prove such commissions, and the bankruptcy of such person against whom such commission hath been or shall be awarded, or other matters or things.

The recent Bankrupt Act (6 Geo. 4, c. 16, s. 96) virtually recognises and confirms this provision, and, moreover, declares that no commission of

[*379] *bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of personal estate, shall be received as evidence, unless the same shall have been so entered of record as aforesaid. The circumstance that the bankrupt will join in the conveyance does not, it is conceived, supersede the necessity of the enrolment, for it does not necessarily follow that the property must belong either to the bankrupt or to the assignees under such commission. The invalidity of the commission might let in the title of third persons. The assignees, of course, are at liberty, by the terms of the contract, to throw the expense of the enrolment, if required, on the purchaser.

As to searching for incumbrances.

The duty of searching for incumbrances, of course, devolves upon the purchaser's solicitor, he having been apprized, by his counsel advising upon the title, by what incumbrances the estate is liable to be affected. Complete safety is only to be found in searching for every such incumbrance, though the list of them is somewhat formidable, comprising judgments, Crown debts, accountantships to the Crown, bankruptcy, and insolvency. Sometimes it may be prudent to ascertain the non-existence of all these. Often, however, the rank and situation in life of the parties are such as to render the precaution with respect to some of the points of

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inquiry superfluous. For instance, no person would think of searching the bankrupt office, where the vendor had never been in trade, or the insolvent office, where he was a person of known opulence and respectability; but, unless in very obvious cases of this kind, the searches should be made, or, if they be omitted at the desire of the purchaser himself, his solicitor should obtain his written authority for dispensing with them. The responsibility often incurred by the neglect of this precaution is very serious; the effect is to transfer the risk from the purchaser himself to the solicitor, though the sole object of the latter in avoiding the search may have been to prevent expense to his client. Probably, few persons would be disposed to press their claim under such circumstances, but a prudent man will scarcely be satisfied to rest his security on the existence of an honourable feeling of this kind. A striking illustration of the danger of neglecting to search the office of the Insolvent Debtors' Court occurred within the Editor's knowledge only a few weeks since. A person purchased a freehold house, which the vendor claimed by devise from his father, and of which he was in possession. The title was apparently well deduced, the conveyance executed, and possession delivered on the payment of the purchase money, and, on the day following the completion of the purchase, the purchaser received notice from the vendor's assignee, claiming the property under the Insolvent Debtors' Act, of which act the vendor had taken the benefit. Considering the exact point of time at which this claim was set up, and some other circumstances, there was strong reason to suppose that the assignee had designedly placed it in the power of the vendor to commit a fraud; but no distinct evidence of this could be adduced, nor, if proved, would it have enabled the purchaser to retain the property.

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Judgments.

*In the case of a vendor, who is simply seised in fee, the purchaser's first concern will be to ascertain the non-existence of docketted judgments against him.

The search for judgments, if pushed to the point at which complete safety is to be attained, would be enormously expensive, for such search ought to extend to judgments against all the persons to whom the property has successively devolved for a long series of years (say twenty or thirty), commencing, not from the time at which they severally acquired the estate, but at the remotest period at which judgments might have been entered up against them; for, let it be remembered, that a judgment affects after-acquired property, and is not confined in its operation to the lands of which the debtor was seised at the time. The search, therefore, should be carried back to the birth, or, at all events, to the childhood of such debtor. Perhaps, indeed, where there is no particular reason to suspect the existence of judgments during minority, the search may properly stop at his majority. How much the practice falls short of this rule is obvious. The search is generally confined to the last purchaser, and the persons deriving title from him; it being assumed, that every prior purchaser has

To what extent the search for judgments should be carried.

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performed his duty†, by searching for incumbrances against his vendor, and the search rarely goes farther back than the time when the person against whom the search is made acquired the property.

A judgment creditor can only take a moiety of his debtor's lands in execution, which means a divided, and not an undivided moiety, *i. e.* the sheriff sets out a moiety by metes and bounds, and every subsequent judgment creditor, in like manner, takes a moiety of what is left. *Huit* v. [*381] **Cogan*, Cro. El. 482. See also 5 Bing. 332. But a plaintiff having two judgments, each of the same term, may, by suing out a separate execution on each judgment at the same time, take both moieties, and, by this means, possess himself of the entirety. *Attorney-General* v. *Andrew*, Hardr. 23. And the same rule has been lately decided to apply where the two judgments (being of the same term) on which contemporaneous executions are taken out, are at the suit of different persons; the sheriff is bound to give a moiety to each. *Doe* d. *Cheese* v. *Creed*, 2 Moore & Payne, 648; *Doe* d. *Davies* v. *Creed*, 5 Bing. 337.

Docketting of judgments.

The statute 4 & 5 William & Mary, c. 20, directs, that judgments shall be docketted and entered; and provides, that no judgment not docketted or entered shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestor's, testator's, or intestate's effects‖. It has been decided, that a purchaser is bound by a judgment,

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†This assumption was formerly more extensively acted upon than it now is, for the practice of dispensing with the investigation of titles was founded on it. In regard to incumbrances, its adoption seems to be matter of necessity; for, if the inquiry as to judgments, Crown debts, annuities, bankruptcy, and insolvency, already sufficiently onerous as applicable to the vendor only, were to be extended to all the anterior successive owners, small properties would cease to be saleable. In this, and many other particulars, a purchaser must be content to rest his security on probabilities. After the lapse of many years, it is not probable that an unsatisfied judgment against a former owner exists, and a judgment creditor would have some difficulty in obtaining information as to the property of which the debtor has from time to time been seised since it was entered up, and of the nature of his estate, &c. And equity would give him no assistance by way of discovery against a purchaser for valuable consideration, without notice. *Snelling* v. *Squib*, 2 Ch. Cas. 47. In *Willaume* v. *Gorges*, 1 Camp. 217, the satisfaction of a judgment thirty-two years old was presumed, there not being sufficient evidence to rebut such presumption.

‖ An undocketted judgment is to be regarded as a simple contract debt in the administration of assets of the deceased debtor. *Landon* v. *Ferguson*, 3 Russ. 349.

of which he has notice, though not docketted. *Davis* v. *Earl of Strathmore*, 16 Ves. 419. And the same point has been ruled with respect to a judgment not registered pursuant to the act of 2 & 3 Ann. c. 4, (the West Riding Yorkshire Register Act), stated *ante*, Vol. 5, p. 217. *Tunstall* v. *Trappes*, 3 Sim. 301. Although the notice in these cases must be actual, and not constructive, (*vide ante*, Vol. 5, p. 218); yet notice to the solicitor of the party in the course of the same transaction, is deemed to be actual notice. *Tunstall* v. *Trappes*, 3 Sim. 301.

Trust estates liable to be taken in execution.

Before the statute of uses, the lands of *cestui que use* (see stat. 1 Rich. 3, c. 1) were liable to execution at the suit of his creditor; and when, subsequently to that statute, uses were revived under the denomination of trusts, the necessity was felt of giving to the creditors of *cestuis que trust* the same remedies by execution which they possessed against the legal owners of the lands. Hence, the well-known provision in the statute of frauds, (29 Car. 2, c. 3, s. 10), which enacts, that it shall be lawful for every sheriff or other officer, to whom any writ or precept is or shall be directed at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance thereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, and hereditaments, as any other person or persons be, in any manner or wise, seised or possessed, or thereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said person against whom execution thereafter should be so sued, had been seised of such lands, &c., of such estate as they be seised of in trust for him *at the time of the said execution sued;* which lands, &c., by force and virtue of such execution, shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person as shall be so seised or possessed in trust for the person against whom such execution shall be sued: And if any *cestui que trust* thereafter shall die, leaving a trust in *fee-simple to descend to his heir, then, and in every such case, such trust [*382] shall be deemed and taken assets by descent, and the heir shall be liable to, and chargeable with, the obligation of his ancestors for or by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended, any law, custom, or usage to the contrary, in anywise notwithstanding.

Prior legal estate a protection against judgments, when.

This statute, it will be perceived, enables the creditor of the *cestuis que trust* to issue execution against the lands which the trustee holds in trust for the debtor "at the time of the execution," but not to follow the lands in the hands of his alienee. But, though a creditor cannot obtain execution under the statute after alienation, yet it should seem, that, if the purchaser have notice of the judgment, it would be an equitable lien as against him, for the statute leaves the equitable effect of notice untouched. A

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difference of opinion, however, has prevailed upon this point. See Sugd. Vend. 8th ed. 480.

Judgments against the *cestuis que trust* being (subject to the statute) equitable liens only, it follows, that they are void as against a purchaser getting in a prior legal estate, whether of freehold or for a term. See *Willoughby* v. *Willoughby*, 1 D. & E. 763. But this protection should never be relied on, except under the following circumstances: 1st, Where the purchaser had no notice of the judgment at the time of the purchase. *Tunstall* v. *Trappes*, 3 Sim. 286. 2nd, Where the legal estate is sufficiently old in its creation to exclude the possibility of the property being affected by antecedent judgments. 3rd, Where it has not been so long disused as to afford ground for presuming a reconveyance or surrender. *Vide ante*, Vol. 6, p. 468.

If there be any doubt in regard to either of these points, no confidence should be placed in the legal estate, as a protection. A purchaser intending to depend for protection upon the legal estate, will of course not search the docket-office for judgments, since the effect would be to give him notice of their existence, and deprive him of the benefit of the protection as to such judgments. The mere entry and docketting of a judgment, it is clear, are not notice.

Appointees entitled to hold the lands discharged from judgments affecting the appointors.

A very important doctrine recently established in regard to the lien of judgment creditors is, that *a person claiming by appointment from the debtor, and therefore being in immediately under the deed creating the power, is entitled to hold the lands unaffected by judgments against the donee of the power*, the appointee's title being paramount to that of the judgment creditor. The case was as follows:—In Michaelmas term, 1822,

[*383] a judgment was *entered up against Thomas Baker, at the suit of the defendant Thomas Jones, for the sum of 6,000*l.*, and on the 13th of December, 1827, the defendant sued a writ of *elegit* on the said judgment, under which the sheriff, finding the seisin of the said Thomas Baker, delivered the lands to the defendant. The seisin and title of Thomas Baker the debtor commenced with and under indentures dated the 29th and 30th days of November, 1826; and, by these indentures, the lands in question were conveyed to the following uses, namely, "to such use and uses, and to and for such estate and estates, interest and interests, ends, intents, and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to, with, and under such powers, provisoes, conditions, limitations, declarations, and agreements, as Baker, at any time or times, and from time to time hereafter, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be sealed and delivered by him, Baker, in the presence of, and to be attested by, two or more credible witnesses, shall direct, limit, or appoint; and, in default of, and until, such direction, limitation, or appointment, to the use of the said T. Baker and his assigns,

for and during the term of his natural life, without impeachment of waste, and from and after the determination of that estate by any means in his life-time, to the use of Beriah Drew, and his executors and administrators, during the natural life of the said Thomas Baker, In trust, nevertheless, for Baker and his assigns, and to permit him and them to receive the rents, and also to prevent any wife of Baker from being entitled to dower out of or in the premises, or any part thereof; and from and after the determination of the estate so limited in use to the said Beriah Drew, and his executors and administrators, during the natural life of Baker, in trust as aforesaid, and in the meantime subject thereto, to the use of Baker, his heirs and assigns for ever." And by indenture, dated the 29th of March, 1827, and made between the said Thomas Baker, of the one part; and the said J. A. Wigan, of the other part *(being an indenture duly executed and attested according to the said power)*; after reciting the said indentures of lease and release, and stating in that recital the said power, and also reciting a certain bond and equitable mortgage from Baker to Wigan to secure 4,000*l.* and interest, and an agreement to release other property, *It is witnessed, that, in pursuance of the agreement, and in consideration of the debt of 4,000*l.*, Baker, in execution of the said power or authority reserved to him by the said indenture of lease, and of all other powers or authorities, did direct, limit, and appoint, that the messuages, lands, and hereditaments thereinafter described, with their appurtenances, should thenceforth remain, continue, and be, to the use of Wigan, his executors, administrators, and assigns, for the term of 500 years; subject, nevertheless, to the proviso for cesser thereinafter contained; and it is further witnessed, that, in further pursuance of the said agreement, Baker did grant, bargain, sell, and demise, unto Wigan, his executors, administrators, and assigns, divers hereditaments, situate at Mayfield, and including all the lands in question, To hold unto Wigan, his executors, administrators, and assigns, for the aforesaid term of 500 years, with a proviso for cesser of the said term on payment of the 4,000*l.* and interest in the usual manner. *The question was, whether the lessor of the plaintiff, claiming under the appointment and mortgage, or the defendant claiming by virtue of the judgment, had the preferable title.

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Preston for the lessor of the plaintiff.—It must be admitted that the judgment attached upon the life estate, and upon the ultimate limitation in fee; but, consistently with the principles of law, and the rules of property, the debtor has, by means of the appointment, defeated the life estate and the remainder in fee. It may also be admitted, that, if the debtor had made a demise for years, without mentioning his power, such a demise would have operated as an execution of the power *pro tanto*. In Ireland, where securities by judgment are more common than they are here, it has lately been decided, that an appointment would defeat the lien of the judgment creditor. The appointee is enabled to claim, without noticing the ul-

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Purchasers claiming by appointment exempt from judgments against the vendor.

terior uses. So, in pleading, the party would state his title as derived immediately from the person creating the power. (*Bayley*, J.—Being *in*, as you say, paramount the other limitation.) The judgment creditor does not come in under a conveyance from the appointor. The law does not prevent the debtor from defeating the lien of the judgment creditor, provided the act be not contrary to good faith. In Sir *Edward Clere's* case, 6 Rep. 17 b, the question was, whether an appointment by will could defeat the seisin of the appointor, so as to enable him to devise the entirety of land held by knight service: the only point was, whether the will operated by virtue of the power, or of the ownership, it being admitted that, if the devisee took by virtue of the power, the seisin of the appointor would have been defeated. In *Ray* v. *Pung*, 5 Barn. & Ald. 561, the wife was unquestionably dowable in respect of the fee of which her husband had had seisin; but the power of appointment was exercised, and the Court decided that the fee was thereby defeated, and that the title of dower, which had attached, was thereby destroyed. If dower can be defeated, why not the judgment creditor, at least so far as the appointment goes. That case runs upon all fours with the present, except that dower is more favoured in law than the lien by judgment. In *Roach* v. *Wadham*, 6 East, 289, the question was, whether a covenant was so knit to the estate, that an appointee of the covenantor was bound by the covenant. It was held, that the appointee was in by the donor, and not by the donee who executed the appointment, and that he claimed by a title independent of the covenant. All these cases turned upon precisely the same point, and shew that any act done by the appointor, which is not inconsistent with the retaining of the power of appointment, may be defeated by an exercise of that power. In 3 Swanston, 277, the editor has added a note of a case, taken from Finch's MS., (*Witham* v. *Bland*, Finch, 126), in which it was held that a sequestration was defeated by the exercise of a power of revocation and new appointment. There is no difference between the effect
[*386] of a sequestration, and of *an *elegit;* and in that case no doubt seems to have been entertained as to the effect of the appointment in defeating the sequestration.

Richmond, contrà.—The attempt to defeat a judgment creditor by the execution of a power of appointment is a perfect novelty in conveyancing. The usual practice is, to direct searches for judgments, notwithstanding the conveyance is by an appointment. No hint can be found in any of the text writers, that protection can be obtained against a judgment by the means now suggested. The absence of any express authority on the subject is in favour of the defendant, who relies upon the constant practice of conveyancers. It can hardly be contended, that a judgment does not affect the after-acquired lands of the debtor.

The Court, after taking time for consideration, decided in favour of the plaintiff, thus establishing the priority of the appointee to the judgment

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creditor. Lord *Tenterden*, C. J., said, "It has been established ever since the time of Lord Coke, that, where a power is executed, the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions are, where the person executing the power has granted a lease or any other interest, which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception as an act done by the party, for it is considered as a proceeding *in invitum*, and therefore falls within the rule." *Doe* d. *Wigan* v. *Jones*, MSS. now reported 10 Barn. & Cress. 459. See also *Tunstall* v. *Trappes*, 3 Sim. 300.

Remarks upon *Doe* d. *Wigan* v. *Jones*.

Considering that the conveyance by appointment has become, through the introduction of the present mode of framing limitations to exclude dower, the ordinary assurance between vendors and purchasers, the decision, that appointees are not bound by judgments entered up against the donees of the power, will tend greatly to relieve property from this most inconvenient incumbrance, and consequently to facilitate its alienation—an object, in a commercial country, of such paramount importance, that every legislative enactment, or legal adjudication, which promotes it, must be regarded as a national benefit; and though this advantage in the present instance is obtained at the expense of a *boná fide* creditor, it must be borne in mind, that judgment creditors do not look to the land as their primary or chief security, (or why have they not obtained an express charge?) but to the general power they possess, of taking in execution, at their option, the person or property of their debtor.

Effect of trust for conversion in regard to judgments.

It remains to be noticed, that, where real estate has been conveyed in trust for sale, by which means it becomes impressed with the qualities of personalty, it is not liable to judgments entered up against the grantor, subsequently to the conveyance, unless the conveyance was made with a fraudulent intent. And as a contract for sale effects a similar constructive conversion, or rather, as it transfers the equitable ownership to the purchaser, he is secure against judgments entered up subsequently to the contract, so far as he has paid his purchase-money, although he may not have taken a conveyance. See *Finch* v. Earl of *Winchelsea*, 1 P. W. 282. It is remarked, however, by Mr. Preston, that "all judgments obtained against the vendor, subsequently to the date of the contract, and prior to the completion of the purchase, are in practice considered as liens, of which it is incumbent on the vendor to procure discharges by release or satisfaction, for the security *of the purchaser, so far as any part of the purchase-money may remain unpaid, after the judgment and notice thereof." 3 Prest. Abstr. 329. This seems to be a proper precaution, because, the judgment is a lien on the unpaid purchase-money. On the same principle, if a vendor, subsequently to the contract, were to make a mortgage, of which the purchaser has notice, he would be bound to see the money remaining un-

Judgments after contract.

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paid applied in its liquidation. In a late case, a tenant for life, and his son, tenant in tail in remainder, joined in conveying the lands by means of a common recovery to trustees upon trust for sale, and out of the proceeds to pay 30,000*l.* to the father, and the residue to the son, and it was declared that the trustees' receipts should discharge purchasers. The trustees contracted to sell part of the property, after which, judgments were entered up against the father, which the purchaser required should be satisfied; but his objection was overruled, on the ground that the judgments could not affect the property, since the son had a right to insist on the execution of the trusts against the father and his creditors, by the terms of which trusts the trustees were authorized to give discharges to purchasers. *Lodge* v. *Lyseley*, 4 Simons, 70.

Judgments need not be searched for on sales by assignees of bankrupt.

It should be observed, that, as judgments are void against bankrupts' estates, whether docketted or not, (*vide ante*, Vol. 5, pp. 235, 488), purchasers from assignees need not search for judgments against the bankrupt; and it is immaterial that the contract was originally entered into with the bankrupt before his bankruptcy, and the conveyance is taken from the assignees. *Sharpe* v. *Rhoade*, 2 Rose, 192. But, in a case where the bankruptcy intervened between the execution of the conveyance and the payment of the purchase-money, the exemption from judgments against the bankrupt was considered to be not so clear, as that a purchaser could be compelled to take the title. *Sloper* v. *Finch*, Sugd. Vend. 8th ed. 686, 2 Ves. & Bea. 145.

Copyholds not liable to judgments.

Copyholds, not being liable to be taken in execution, are of course not affected by judgments.

Leaseholds bound by execution, from delivery to the sheriff.

With respect to leaseholds, a search for judgments is only necessary for the purpose of ascertaining that no writ of execution is in the hands of the sheriff. The goods of a debtor were formerly bound from the teste of the writ of execution. But by the 16th section of the statute of frauds, (29 Car. 2, c. 3), the property of goods is bound only from the time that the *fi. fa*, or other writ of execution, *is delivered to the sheriff to be executed.* See *Jeanes* v. *Wilkins*, 1 Ves. sen. 196. It seems to be the better opinion, that leaseholds are not within the 10th section of the statute, rendering the trusts of lands liable to execution. *Lyster* v. *Dolland*, 1 Ves. jun. 436. In a recent case, the purchaser of leaseholds from an administrator, objected to the title on account of the existence of judgments against the intestate, entered up so long ago as 1769 and 1770, alleging the possibility of execution having been taken out; but it appearing that the intestate had parted with the legal estate to a mortgagee in May, 1770, and there being no evidence of the issuing of an execution prior to that time, the objection was overruled. *Causton* v. *Macklew*, 2 Sim. 242.

By the provisions in the Middlesex and other Register Acts, judgments do not affect lands, unless registered in the manner prescribed by those

acts. (*Vide ante*, Vol. 5, p. 216). But it has been decided that a purchaser is bound by a judgment, though unregistered, of which he has notice. *Tunstall* v. *Trappes*, 3 Simons, 301.

As to Crown debts.

Crown debts are next to be considered. Where the purchaser has reason to suspect that the vendor *is*, or that any other person through whom the title is derived, previously to his parting with the estate, *was* a Crown specialty debtor, search should be made in the proper offices for information on the point. Some persons, indeed, adopt the precaution of making the search in regard to the vendor, as a matter of course; and this practice seems to be warranted by the consideration that persons often become bound to the Crown in the character of sureties, who are not concerned in the payment or receipt of the public revenue.

—by simple contract.

But *boná fide* purchasers for valuable consideration without notice are not liable to be affected by simple contract Crown debts. And, therefore, where it appeared by the finding of the inquisition, that, on the *26th of January, 1797, A. was indebted to the King in the sum of 26,000*l.* and upwards, (being a sum received from the Paymaster-General for the King's use, but which debt had not been entered of record); and that C. and D. were seised in trust for him of certain hereditaments; and that, by indentures of lease and release of the 1st and 2nd of June, 1803, such hereditaments were conveyed for a pecuniary consideration to B., who had no notice of A. being a Crown debtor, Lord Chief Baron *Macdonald*, in an elaborate judgment, held, that the property was not bound. *King* v. *Smith*, Wightw. 34. But, if the debt to the Crown be secured by bond or other specialty, though not recorded, it becomes, by the stat. 33 Hen. 8, c. 39, a lien upon the land, and the lien attaches as well on equitable as on legal interests. And it has been decided, that the taking an assignment of a term, which had been assigned to attend the inheritance, in trust for the debtor, affords no protection to a purchaser even without notice; *King* v. *Smith*, Sugd. Vend. Append. Cas. 16, Mann. Exch. 235—a decision which is strongly animadverted upon by the distinguished author of the Treatise of Vendors and Purchasers, Sugd. Vend. 8th ed. 450; but seems now to have settled the rule upon the point. If the term, however, has never been assigned in trust to attend the inheritance for the debtor, a *boná fide* purchaser, obtaining an assignment of it to his trustee to attend, will have a good title against the claim of the Crown. Therefore, where, upon a purchase of the inheritance in fee in lands, a term of 1000 years was limited to the vendor, to secure part of the purchase-money, and, subject to the term, the fee was limited to the purchaser, who afterwards sold the property *without having paid off the mortgage debt;* and the second purchaser paid off the mortgage, and took an assignment to a trustee for himself to attend the inheritance; it was held that the term was not bound by the specialty Crown debt of the first purchaser. *Rex* v. *Lamb*, 13 Price, 649. Although, where a term is at-

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—by specialty.

Term no protection against Crown debts, when.

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tendant on the inheritance, the Crown, by acquiring an interest in the inheritance, acquires a corresponding interest in the term; the Crown debt does not affect a term in gross, whether equitable or legal, until the *teste* of the extent; Mann. Excheq. 2nd ed. 247; which *teste* cannot be carried back beyond the *fiat* on which the extent issued. Ib. 28.

Goods bound by an extent from the teste.

The Crown is not affected by, because not named in, the 16th section of the statute of frauds, declaring that the property in goods shall be bound only from the time of the delivery of the writ to the sheriff; an extent, therefore, binds the goods from the *teste;* Manning's Excheq. 2nd. ed. 49; but a *boná fide* alienation, before the teste of the extent, will clearly be good against the King. *Fleetwood's* case, 8 Rep. 171. It has been lately decided that a writ of *fi. fa.*, under which the debtor's goods have been seized, but not sold, is liable to be over-reached by an extent tested subsequently to the seizure, on the ground that the property of the goods remains in the debtor in the interval between the seizure and the sale; and that it is immaterial whether the extent is in chief or in aid. *Giles* v. *Grover*, 2 Moore & Scott, 197. Nor is the Crown bound by the bankrupt laws; and, therefore, purchasers from assignees are not relieved from the necessity of ascertaining the non-existence of specialty Crown debts. *Attorney-General* v. *Aston*, 2 Mod. 248; Mann. Excheq. 2nd. ed. 33. Lastly, it is to be observed that the Middlesex and Yorkshire Regis-

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ter Acts *do not extend to recognizances to the Crown†. Far too little attention seems to have been paid to the giving due publicity to these formidable emanations of the royal prerogative; in illustration of which it may be mentioned, that the late statutes authorizing pecuniary advances by the Exchequer Loan Commissioners upon bonds, make no provision whatever for the record of these obligations. Surely, if the protection of the interests of the public requires that the Crown, in the prosecution of its claims, should be invested with the power of seizing upon property which has passed out of the hands of its debtor into those of a *boná fide* purchaser, justice and sound policy, or, in other words, the interests of that same public, also imperatively require that the existence of such claims

As to Accountants to the Crown.

should be rendered as notorious as possible. Persons holding under the Crown offices which were in existence at the time of the stat. 13 Eliz. c. 4, are accountants within the meaning of that statute, and are, therefore, incapacitated from making a title to a purchaser, whether any debt is due to the Crown at the time of the conveyance, or not, as the land would be affected by debts subsequently contracted. *King* v. *Bishop of Sarum*, Moore, 126, pl. 274; *Nicholls* v. *How*, 2 Vern. 389. See further as to Crown Debts and Accountantships, 3 Prest. Abst. 290, and Mann. Excheq.

Bankruptcy.

Bankruptcy, it is well known, disqualifies persons from contracting for

† *Vide ante*, Vol. 5, p. 216.

the sale of, or conveying, their property. If the vendor, therefore, be in trade, the purchaser's solicitude will properly be directed to this point. The extent of his risk now depends upon the provisions of the recent act, 6 Geo. 4, c. 16, s. 81, which protects the sale or conveyance, &c. if made more than two calendar months before the date and issuing forth of the commission, notwithstanding any prior act of bankruptcy; provided the person dealing with the bankrupt had no notice of such prior act of bankruptcy. If a commission be superseded, and any other commission issue within two calendar months after the *supersedeas*, the transaction, in order to be valid, must be more than two calendar months before the issuing of the first commission. By sect. 83, the issuing of a commission is to be deemed notice of a prior act of bankruptcy, if the adjudication has been notified in the London Gazette, and the person to be affected may reasonably be presumed to have seen the same. Sect. 86 provides, that no purchase for valuable consideration shall be impeached by reason of notice of a prior act of bankruptcy, unless a commission shall be sued out within twelve calendar months after the act of bankruptcy.

What dealings by a bankrupt valid.

Who are traders, and what amounts to an act of bankruptcy, may be seen by a reference to the statute, and the treatises on the bankrupt laws.

A conveyance of the trader's whole estate will be an act of bankruptcy, unless it conform to the 4th section, stated *post*, Vol. 8, p. 424; but this or any other acts of bankruptcy would not, according to the 86th section, affect *the dealings of the bankrupt with third persons, after the lapse of twelve months.

Conveyance of all the trader's estate when not an act of bankruptcy.

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The fixing of twelve months as the period within which an act of bankruptcy, of which the party has notice, must be followed by a commission, in order to affect him, instead of five years, which was the time under the statute of James, appears to be a material improvement. Another important and salutary alteration made by the act is, that it takes away notice of insolvency, as a ground for invalidating dealings with the bankrupt. The indefiniteness of the term "insolvency," (which was first introduced in Sir *Samuel Romilly's* act), opened a door to much litigation. But though notice of insolvency is now immaterial, it does not follow that a purchaser can safely deal with a trader, who is known to be in sinking circumstances. There is still the danger of a secret act of bankruptcy having been committed, and a commission issuing within two months. If the purchaser have notice of an act of bankruptcy within the last twelve months, the danger will extend during the residue of such period; and a Court of equity would not compel a purchaser to accept a title after such notice, even if the vendor offered to swear that he owed no debt which would support a commission; *Lowes* v. *Lush*, 14 Ves. 547; *Franklin* v. Lord *Brownlow*, Id. 550; where at least the person with respect to whom the point arises is the vendor himself, who, being interested, is incompetent to prove it; but if the objection occurs in regard to a third person under whom the vendor derives title, and who may there-

Two important alterations made by the recent act.

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fore be called as a witness to the fact, the argument seems not to apply; though even here, if the trader is a member of a firm, the evidence must negative the existence of demands sufficient to support a commission as well on his separate as the joint estate. *Pott* v. *Turner*, 4 Moo. & Pay. 551.

Whether the issuing a commission is notice of an act of bankruptcy.

It is clear that a purchaser, without notice, may avail himself of the protection of the legal estate against the effect of an act of bankruptcy, *prior to his purchase, though a commission should issue within the two months. See *Collett* v. *De Gols*, Cas. Temp. Talb. 65. And some persons have thought, that a purchaser, without notice, even after a commission issued, is within the rule; but this is extremely doubtful; for, even independently of the enactment in the late bankrupt statute, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy; there is strong ground to contend that the issuing of a commission is an act of such notoriety, as to deprive a purchaser of every pretext for the plea of want of notice. See Cas. Temp. Talb. 70. That act, however, declares, in general terms, that issuing a commission shall be deemed notice of a prior act of bankruptcy; and though it might seem that this enactment had more immediate relation to the two immediately preceding sections, by which validity is given to transactions of the bankrupt two calendar months before the issuing of the commission, notwithstanding a prior act of bankruptcy, *of which the party had no notice;* yet such a construction would produce this palpable incongruity, that the transactions are to take place before the issuing of a commission, and the issuing of the commission is to be notice in such transactions. But, by no construction can this anomaly be avoided in regard to the stat. 46 Geo. 3, c. 135, because the enactment in terms was, that the issuing of the commission should be notice *for all the purposes of the act*, and the only purposes in which notice is referred to, expressly relate and are confined to transactions *before* the commission. It is remarkable that this error has escaped observation.

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Sales of property acquired after bankruptcy.

If a commission of bankruptcy be, as it has been suggested, notice of a prior act of bankruptcy, it would be contrary to the established principles of equity to allow a subsequent purchaser to derive any advantage from getting in a legal estate, against the equitable claim of the assignees. Where the vendor, having been bankrupt, has obtained his certificate, the material point to be ascertained is, that the certificate was prior to his acquisition of the property; and also, if it be his second bankruptcy, or the bankrupt has previously been discharged by an insolvent act, that his estate has paid 15*s.* in the pound; for if not, then, by the 127th section of the late act, his future estate and effects, notwithstanding his certificate, will vest in the assignees, who are authorized to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission. This enactment goes farther than the statute 5 Geo. 2, c. 30, s. 9, which simply declared, that the es-

tate should remain liable to the creditors; and this was held not to prevent the bankrupt from making a title to after-acquired property. The present act, of course, admits of no such construction, as the property vests absolutely in the assignees.

As to insolvent debtors.

Under the last Insolvent Debtors' Act, 7 Geo. 4, c. 57, all the property, real and personal, acquired by the insolvent before his final discharge, passes under the provisional assignment, and the permanent assignment transfers to the permanent assignee whatever was vested in the provisional assignee. *Hepper* v. *Marshall*, 9 J. B. Moore, 710.

By the 57th section of the act it is provided, that, before adjudication, the prisoner shall be required to execute a warrant of attorney, authorizing the entering up judgment in one of the Courts at Westminster, in the name of the assignee, for the amount of his debts; and the order of the Court for entering up such judgment is declared to be a sufficient authority to the proper officer for entering up the same, *and such judgment is to have the force of a recognizance.* And when it appears to the satisfaction of the Court that the prisoner is of ability to pay his debts or any part thereof, or is dead, leaving assets, the Court is to permit execution to be taken out.

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As to searching for annuities.

*In addition to the preceding objects of inquiry, some practitioners extend their searches to memorialized annuities; and this, in particular cases, may be a proper precaution, the granting of redeemable annuities being a mode of raising money usually resorted to by those whose estates are too much incumbered to admit of their obtaining it at the legal rate of interest. But, in ordinary cases, the search can scarcely be recommended, since the memorial conveys no information as to the particular lands charged; nor does it necessarily state whether any lands are charged or not; (see *ante*, Vol. 5, p. 583); and therefore confers no priority upon the annuitant relatively to any other incumbrancer. The search, however, often serves as an useful index in regulating the search for judgments, since redeemable annuities are generally secured by a judgment entered up by virtue of a warrant of attorney.

Suggestions to persons preparing abstracts of title.

The present article, it is conceived, may usefully be concluded by a few hints to persons preparing abstracts of title. Though some of the remarks may appear rather obvious and unimportant, an attention to them would greatly facilitate the labour of perusing the abstract.

1. Abstract all the deeds, commencing with the earliest, and not excepting any which may be supposed to have become immaterial, as mortgages which have been reconveyed, &c. (*Vide ante*, p. 360.)

2. Distinguish, by separate margins, the various parts of the deed, and accurately state names, places, dates, &c.

3. Where, for a certain period, there is a distinct title to the several

CONDITIONS OF SALE.

parts of the estate, but which afterwards become united in ownership, deduce the title to each part separately up to the point of junction. (By blending the whole under one general chronological arrangement much confusion is produced).

4. State by whom each instrument is executed, and, if it be an appointment by virtue of a power, which prescribes a particular mode of attestation, give an exact copy of the memorandum of attestation; and if the instrument be a will, mention the time of the testator's death, and where the will was proved.

5. Invariably transcribe the memorandum of attestation appearing to wills of freehold estate, including the names and descriptions of the witnesses; because the devisee, whose title is derived through the will, might happen to be one of those witnesses, which would vacate the devise to
[*393] him. (*Vide* stat. 25 Geo. 2, c. 6). *Unless the will is long, an exact copy of the whole should be furnished; but where the length renders this inconvenient, extract the material parts in the precise words of the testator, which is better than stating the effect or substance, the correctness of which often depends on the right application of very difficult rules of construction.

6. Preserve distinctness between statements in the deeds and your own observations. Thus, where a deed contains the same parcels as the last abstracted deed, but to which it does not refer, instead of saying "All the premises comprised in the last abstracted deed," which might lead to the inference that they were conveyed by some description as loose as this say—"All that, &c." and note, in the margin, that the parcels are the same as those of the last deed.

7. Notice in their proper place all extrinsic facts material to the title, (as the alteration of names and boundaries of particular fields, the death of a person without issue, intestacy, &c.), and the nature of the evidence by which it is proposed to support them. Exact copies of certificates of baptism, marriage, and burial, affidavits, &c. should be supplied. (Much time would be saved if an abstract was made as complete as possible in these particulars before it is delivered. The recommendation, however, supposes, that it will have been laid before counsel on behalf of the vendor, to advise on the evidence by which it should be accompanied).

8. Notice any judgments or specialty crown debts which are known to affect the vendor, excepting however where such information would have the effect of rendering the purchaser liable to judgments, which otherwise would not affect him. (As to which, *vide ante*, p. 382).

9. In abstracting deeds of settlement, or wills, creating terms, set out fully the proviso for cesser; as nice questions frequently arise as to whether the term has continuance after the satisfaction of the trusts.

10. In abstracting acts of Parliament, notice all the clauses by which

the title may be affected; as, in an inclosure act, the usual clause that wills, &c. shall not be revoked, but shall have the same operation upon the allotments as they would have had upon the lands subject to the inclosure†.

11. State by and with whom the covenants for title are entered into, and, particularly, covenants for the production of deeds, in order that it may be ascertained whether they run with the land.

*12. Mention which of the abstracted deeds are in the vendor's possession, and in whose custody are the others. [*394]

13. Notice the stamps that are impressed upon the deeds; and the purchaser's solicitor should ascertain that they are the proper stamps applicable to such deeds at the time. This may be a troublesome task, but should be undertaken, particularly in regard to recent deeds, as no deed can be used for the purposes of evidence unless properly stamped. It would therefore clearly be incumbent on the vendor to procure this to be done.

If the abstract of title furnished by the vendor's solicitor be defective in the preceding particulars, it will devolve upon the purchaser's solicitor, in comparing the abstract with the deeds, to render it complete; and this should invariably be done before the title is submitted for the opinion of counsel on behalf of the purchaser. A neglect of this precaution frequently renders a second perusal of the abstract necessary. A copy of the contract, and, where the sale is by auction, of the particulars and conditions of sale, should accompany the abstract, including, of course, as every properly-drawn contract does, a full specification of the lands purchased.

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† A doubt is sometimes raised whether this clause applies to the wills of persons who are living at the time of the inclosure, a will being inchoate during the life of the testator. Nothing, however, can be more clear. It could apply to no other will, for it could not be necessary to declare that the will of a *deceased* testator should not be revoked.

CONDITIONS OF SALE OF LEASEHOLDS.

ORDINARY Conditions *of* Sale *of* Leasehold Property (*a*).

THAT the highest bidder shall be the purchaser; and if any dispute arise between two or more bidders, the premises shall be immediately put up again and re-sold.

II. That no person shall advance less than *5l.* at each bidding, or retract his or her bidding (*b*).

III. That the purchaser shall pay down immediately into the hands of the auctioneers, a deposit of *20l. per cent.* in part of the purchase-money, and sign an agreement for payment of the remainder on or before the —— day of —— next, from which time he will be entitled to the rents and profits (*c*); all outgoings to be cleared by the vendor to

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(*a*) The length of the term, the amount of the rent, &c., are usually inserted in the descriptive particular, and do not appear in the conditions.

Bidding may be retracted.

(*b*) Without a stipulation to this effect, a bidder may retract his bidding at any time before the hammer falls; it being an offer only, which is not binding until its acceptance by the vendor. *Payne* v. *Cave*, 3 D. & E. 148. But in contracts relating to land, the purchaser is not bound until he has signed the contract.

(*c*) If the premises are untenanted, instead of

"rents and profits,"

say—

"possession."

Purchaser at the risk of fire, &c., from the time of entering into the contract.

Sometimes it is provided, that the purchaser shall be at the risk of fire, and other casualties, from the time of sale. But such a provision is unnecessary; the general rule being, that the purchaser, from the time of entering into the contract (see 6 Ves. 352, 7 Ves. 274), bears the risk of accidents; thus, in the case of *Paine* v. *Miller*, 6 Ves. 349, a contract was enforced against a purchaser notwithstanding the destruction of the buildings by fire, although the vendor had suffered a policy which was in force when the contract was entered into, to expire, without any intimation to the purchaser. In this case the fire happened after the time appointed for the completion of the contract, and after the vendee's acceptance of the title; but the reasoning upon which Lord *Eldon* founded his decision

that period; but if, from any cause whatever (*d*), the purchase shall not be completed by the said —— day of ——, CONDITIONS OF SALE OF LEASEHOLDS.

would equally apply if the fire had taken place immediately after the contract, his Lordship's observation being, that, "as to the mere effect of the accident itself, no solid objection (to the specific performance) could be founded upon that simply; for, if the party by the contract has become in equity the owner of the premises, they are become his to all intents and purposes; they are vendible as his, chargeable as his; they may be devised as his, they may be assets, and they would descend to his heir." And it should seem that the principle in question would apply to the case of the title deeds being destroyed by fire, provided the names of the attesting witnesses were preserved, but not otherwise; for, in a late case, where the title deeds had been consumed in a fire which broke out in the offices of the vendor's solicitor after the abstract of title had been compared with the deeds by the purchaser's solicitor; and the Master reported that the abstract thus delivered disclosed a good title; but *it was not known who were the attesting witnesses to the several deeds*:—Sir *J. Leach*, M. R., on the latter ground, held that the purchaser was discharged from his contract; for, without the means of proving the execution of the deeds, he would be unable to assert his title and defend his possession. *Bryant* v. *Busk*, 4 Russ. 1.

As to destruction of title deeds.

(*d*) Under the rule in equity, that what is agreed to be done shall be considered as done, a purchased estate belongs to the purchaser, and the money to the vendor, from the time when the contract ought, according to the terms of it, to have been completed. From this time, therefore, the purchaser is entitled to the rents, if the estate has been in the occupation of a tenant, or to an occupation rent, if it has been occupied by the vendor himself; and the vendor is entitled to interest on the unpaid purchase money from the same period. But the rule in question is not to be applied, where the consequence would be to enable a party to profit by his own wrong. If, therefore, the delay in the completion of the contract has been occasioned by the vendor, and the interest exceeds the rents, (as it commonly does), the vendor will not be entitled to claim interest on his accounting for the rents, but will be compelled to retain the latter. Thus, in *Paton* v. *Rogers*, 6 Madd. 256, where the contract had been delayed in its completion by difficulties in the title, Sir *J. Leach*, V. C., observed, that it was a general, but not an universal rule, that when a specific performance is decreed, the vendor is entitled to his purchase-money, with four *per cent.* interest from the time when the money was contracted to be paid, and the purchaser is entitled to the rents and profits from the time when possession is to be delivered. Sir *W. Grant* seemed to have considered the rule as universal, but he (the Vice-Chancellor) had held, that

Interest on purchase-money.

Party occasioning delay not to have rents or interest so as to derive an advantage.

CONDITIONS OF SALE OF LEASEHOLDS.

the vendor shall receive from the purchaser interest at the rate of *5l. per cent. per annum* on the remainder of the pur-

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where the vendor has improperly delayed the execution of the contract, and refused to give possession†, he ought not to be benefited by the delay he had occasioned. See also *Esdaile* v. *Stephenson*, 1 Sim. & Stu. 123, *post*. The course now is, in these cases, to refer it to the Master, to ascertain whether a good title can be made, and *when it was first shewn that a good title could be made;* and the Court, in decreeing the specific performance of the contract, directs the purchaser to pay interest *from that time*. A decree founded upon this principle was recently affirmed by Lord *Lyndhurst* in *Jones* v. *Mudd*, 4 Russ. 118; see also *Binks* v. Lord *Rokeby*, 2 Swanst. 222. (A good title is said to have been shewn, when it appears that, upon certain acts to be done by the vendor, or by those over whom the vendor has a control, the legal and equitable estates will be in the purchaser; but, if there is an outstanding estate in a person who is under no obligation to convey it, the title is not complete. *Lewin* v. *Guest*, 1 Russ. 325).

When a good title is said to have been shewn.

It should seem, according to a principle which the Courts have adopted in the preceding cases, that if the interest were less than the rents, a purchaser occasioning the delay would not be entitled to take the rents and pay interest.

Vendor responsible for the rents he *might* have received.

It should be observed, that where the vendor has to account to the purchaser for the rents, he will be charged, according to the general rule applicable to trustees, (for it is in the character of trustee that his account is rendered), not only with the rents which he has received, but with what, without his wilful default, he might have received; *Wilson* v. *Clapham*, 1 Jacob & Walk. 36; and he will be bound to make compensation for deterioration in the value of the estate by unhusband-like management, &c., between the date of the contract, and the time when the purchaser was entitled to, and might, (the title being clearly made out), safely have taken

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† But, until the title is complete, the purchaser ought not to take possession, since this act, as well as that of exercising ownership after possession has been taken, would be construed to be a waiver of the objections, unless the contrary be expressly stipulated. See *Burnell* v. *Brown*, 1 Jacob & Walker, 168. On the other hand, it is also imprudent for a purchaser to refuse possession when offered, if the title be free from objection, since he would be at the risk of subsequent deterioration, &c. It seems, that, if the investigation of the title proceeds after the taking of possession, it will be presumed that it was to be no waiver of objections. *Burroughs* v. *Oakeley*, 3 Swanst. 159.

chase-money from that day until the purchase shall be completed.

possession. *Foster* v. *Deacon*, 3 Madd. 394; *Binks* v. Lord *Rokeby*, 2 Swanst. 226; *Ferguson* v. *Tadman*, 1 Sim. 530. It is obvious, that if the purchaser's money is unproductive during the vendor's delay, the rule which exonerates him from paying interest, and leaves the rents in the hands of the vendor, does not sufficiently throw upon the offending party the consequence of his delay, for he (the vendor) is suffered to enjoy the rents, while the purchaser is deriving no advantage from the money. The purchaser, therefore, in such case, may give notice to the vendor that his money is lying dead, and the effect of such notice is to exempt him from paying interest, while he is, by the general rule, entitled to the rents. *Howland* v. *Morris*, 1 Cox, 59; *Calcraft* v. *Roebuck*, 1 Ves. jun. 229; and see *Roberts* v. *Massey*, 13 Ves. 561. It must, however, be made out *bonâ fide* that the money is unproductive; and the circumstance of the purchaser having a larger sum in the hands of his banker than the purchase-money, is not considered as conclusively establishing this fact, for the purchaser would, independently of the purchase, have had *some* balance at his banker's. The Court, it seems, in these cases, will inquire into the state of the banking account at an antecedent period, in order to see if the balance has undergone any material increase, since the money was alleged to be lying dead. Thus, in the late case of *Winter* v. *Blades*, 2 Sim. & Stu. 393, where the bill was filed by the vendor of an estate, merely for the purpose of claiming interest on the purchase-money from the time the defendant, the purchaser, was let into possession. The purchase-money was 14,000*l.*, and, immediately upon entering into the contract, the purchaser called in a sum of money secured by a mortgage, amounting to 12,400*l.*, and, upon entering into possession of the estate, gave notice to the vendor that he was ready to invest the purchase-money as he should direct, pending the investigation of the title. The vendor, hoping for an immediate conclusion of the purchase, did not answer that notice. The investigation of the title, however, occupied nine months. The banker of the defendant proved, that, during the nine months, the balance of the defendant in his hands was never less than 14,000*l.*, except during three successive days, when it was 13,876*l.*; and one other day, when it was 13,796*l.* Sir *J. Leach*, V. C., said, if, after notice given by the defendant, he had made no profit of the purchase-money, then it would not be reasonable that he should be charged with interest. But, that he had made some profit of the money, appeared upon the defendant's own evidence; first, because his balance at his banker's was in a small degree, and for a few days, reduced below the amount of the purchase-money, but principally *because the purchase-money supplied the place of that balance, which he must otherwise have maintained at his banker's.* It was decreed,

Inquiry into the state of the purchaser's banking account, in order to ascertain whether he has lost interest.

CONDITIONS OF SALE OF LEASEHOLDS.

IV. That the purchaser shall have a proper assignment of the premises at his own expense, on payment of the

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that the Master should inquire what was the average balance which the defendant maintained at his banker's, during the three years preceding the purchase, computing such balances at the end of every month; and the Master was also to inquire, what was the average balance which, during the time in question, the defendant maintained at his banker's, computing such balance monthly; and the Master was to deduct what he should find to have been the defendant's average balance for the three years, from what he should find to have been the defendant's average balance during the time in question: and it was declared that, to the amount of that difference, the defendant was not chargeable with interest on his purchase-money.

Notice does not discharge the purchaser, where he has contracted to pay interest at all events.

It is clear, that the giving notice of his money being unproductive, will not discharge the purchaser, where he is bound by the express terms of his contract to pay interest at all events; in such a case, it will be no answer to the vendor's claim, to say that the delay has been occasioned by himself. Thus, in *Esdaile* v. *Stephenson*, 1 Sim. & Stu. 122, where, at a sale by auction, the conditions of sale contained a stipulation, that, if the conveyance was not executed by the necessary parties, and the purchase-money paid on or before a certain day, the purchaser should pay interest at *5l. per cent.* It was contended, on behalf of the purchaser, that the purchase had not been completed on the day, by the fault of the vendor, and that he ought, therefore, not to benefit by his own delay by taking the subsequent interest at *5l. per cent.* which was much more valuable than the mesne profits of the estate. Sir *J. Leach*, V. C.—" Where there is no stipulation as to interest, the general rule of the Court is, that the purchaser, when he completes his contract after the time mentioned in the particular of sale, shall be considered as in possession from that time, and shall from thence pay interest at *4l. per cent.*, taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, there, to give effect to the general rule, would be to enable the vendor to profit by his own wrong; and the Court, therefore, gives the vendor no interest, but leaves him in possession of the interim rents and profits. In the present case, the interest does not depend upon any rule of the Court, but upon the express stipulation of the parties; and the terms of that stipulation apply to every delay, however occasioned. It is highly probable, but I cannot in reasoning assume it as a necessary consequence, that the interest must, under all circumstances, exceed the mesne profits, so as to infer from thence, that the true intention of the parties must have been, that the purchaser should pay interest at *5l. per cent.* only when the delay in completing the

remainder of the purchase-money; but he shall not be entitled to call for the production of the lessor's title (*e*) CONDITIONS OF SALE OF LEASEHOLDS.

contract was occasioned by himself. The purchaser must, under the circumstances of this case, pay interest according to the terms of the conditions of sale." But in the recent case of *Monk* v. *Huskisson*, 4 Russ. 121, n., where the stipulation was, that "if, by reason of any unforeseen or unavoidable obstacles, the conveyances and assurances aforesaid cannot be prepared or perfected on the said "25th day of December, the" purchasers "shall pay interest for the said purchase-money from the said 25th day of December, (from which time they are to be entitled to the rents), after the rate of *5l. per cent. per annum*, until the completion of the said assurances;" Sir *J. Leach*, M. R., held, that the vendor was not entitled to interest until a good title was shewn, and that the effect of the stipulation was, *not to give interest when interest would not otherwise have been payable*, but to fix the rate only, *i. e.* at *5l.* instead of *4l. per cent.*

As to the rate of interest payable.

Where the conditions of sale are silent as to the rate of interest, the rule in equity is to allow *4l. per cent.*, though this rule has not been invariably adhered to; for, in several instances, one of them very recent, *5l. per cent.* has been given. *Waldron* v. *Forrester*, Excheq. 4th May, 1804; Sugd. Vend. 8th ed. 517; *Burnell* v. *Brown*, 1 Jac. & Walk. 168. And an agreement to pay *5l. per cent.* for one purpose, does not conclusively shew that this is to be the rate of interest for all purposes; and, therefore, in a case where the contract contained a stipulation, that the purchaser should be allowed *5l. per cent.* on his deposit, if a good title could not be made, the Court, in decreeing the specific performance of the contract, directed the purchaser to pay *4l. per cent.* according to the general rule; and a motion for varying the minutes of the decree, by increasing the interest to *5l. per cent.* was dismissed with costs. *Thorp* v. *Freer*, 1820; Sugd. Vend. 8th ed. 518.

If part of the purchase-money is to be secured by a mortgage carrying interest at *5l. per cent.*, equity (considering that which is agreed to be done as actually done), will direct the purchaser to pay this rate of interest for the amount intended to be covered by that incumbrance. Indeed, in a late case of this nature, (*Jones* v. *Mudd*, 4 Russ. 118), interest at the same rate, *(i. e. 5l. per cent.)*, was given on the whole purchase-money, and no objection appears to have been made to this part of the decree, though it was appealed against on other grounds. In fact, the point is not adverted to. Probably, the difference of amount was trivial. There seems to be no solid reason why the rate of interest payable on a security to be given for part of the purchase-money should regulate the interest on the whole.

(*e*) A stipulation that the purchaser should accept an assignment "with- Stipulation that

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(*f*): the lease by which the premises are held contains the usual lessee's covenants to pay the rent, to keep the premises in repair, with a covenant to insure against fire, and not to exercise any trade or business on the premises.

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the purchaser shall not require the lessor's title, precludes him from shewing it to be defective.

out requiring the lessor's title" was lately held to preclude him not merely from calling for the production of the lessor's title, but also from shewing that it was defective; and that, therefore, a purchaser who bought with such a stipulation, was not entitled to recover his deposit, on the ground that the lessor's power of leasing did not warrant the lease he had granted. By the contract, the vendor agreed to sell the term "as he holds the same;" but the Court relied principally on the former clause. *Spratt* v. *Jeffery* 5 Mann. & Ryl. 186, *S. C.* 10 Barn. & Cress. 249. The decision does not quite accord with the opinion which has prevailed in the profession on the point, and seems to have been made with the hesitating assent of one at least of the learned Judges. It does not follow, that a Court of equity would enforce the performance of the contract under such circumstances. Their refusal to do so would certainly widen the difference, already too great, between the rules adopted in Courts of law and equity in regard to the right of the purchaser of a lease to require the production of the lessor's title (*vide ante*, p. 371). But where a person who had contracted for a lease, was held to have waived his right to call for the production of his lessor's title, by taking possession after the draft of the lease had been submitted to him; it was nevertheless held that this act did not oblige him to accept a title manifestly bad; and therefore, it appearing by the vendor's own lease, when produced for the purpose of identifying the premises, that he could not make a good title, the Court refused to decree, against the purchaser, the specific performance of the contract. *Warren* v. *Richardson*, 1 Younge, 1.

(*f*) If the premises are held under a renewed lease expressly granted in consideration of the surrender of a former lease, add—

Surrendered lease referred to, not to be required to be produced.

"nor shall require the production of or the deduction of title to any surrendered lease which is referred to in the subsisting lease."

Without a stipulation to this effect, the production of the surrendered lease might be required by the purchaser, the reference to it being notice to him of its contents. See *Coppin* v. *Fernyhough*, 2 B. C. C. 291; and Sugd. Vend. 8th ed. 313. And by parity of reason, if such lease contained, as it probably would, a similar reference to a prior lease, the prior lease must also be produced, and so on to the original lease. With this requisition, it is often not in the power of the vendor to comply, as the surrendered leases are given up to the lessor.

CONDITIONS OF SALE OF LEASEHOLDS.

V. That the auction duty of 7*d.* in the pound shall, immediately after the sale, be paid to the auctioneers by the purchaser.

VI. That if any error to the prejudice of the purchaser shall appear to have been made in the description of the property, or of the vendor's interest therein, such error shall not vacate the sale; but the purchaser shall accept such compensation (*g*) as shall be fixed by two persons, *one to [*402] be chosen by each party, or by their umpire, whose decision shall be final between the parties.

Lastly. That if the purchaser shall neglect or fail to comply with the above conditions, the deposit money shall be forfeited; the vendors shall be at full liberty to re-sell the said property, by public or private sale, without previously tendering an assignment (*h*) to the purchaser; and the deficiency, if any, together with all charges attending the same, shall be made good by the defaulter at this present sale (*i*).

As to errors of description.

(*g*) Frequently it is provided that the vendor, as well as the purchaser, shall have compensation for any error of description. This, however, seems hardly fair, as the mistake arises from the negligence of the vendor, and the effect of giving the vendor compensation for any excess of quantity, is to make the purchaser buy more than he contracted for. A man who has bought ten acres might be compelled to take twelve acres; or, one who has bought a lease of forty years, to take a lease of sixty years at a proportional advance of price.

(*h*) These words are unnecessary, though usual, as the vendor is not in any case bound to tender a conveyance. *Webb* v. *Bettel*, 1 Lev. 44; *Baxter* v. *Lewis*, 1 Forrest. Excheq. Rep. 61; Sugd. Vend. 8th ed. 232.

Vendor may re-sell, and claim the deficiency.

(*i*) If the purchaser fails to perform his part of the contract, the vendor may, under this condition, re-sell the property, and recover the deficiency from the purchaser; or, if he has become bankrupt, may prove it against his estate.

Thus, in the case of *Ex parte Hunter*, 6 Ves. 94, where the estate in question had been, on the 1st of August, 1797, put up to auction, when A. became a purchaser at the price of 4,670*l.*, paying a deposit of 10*l. per cent.*; and it was stipulated, that if the purchaser should fail to comply with the conditions, the deposit should be forfeited, and the proprietors should be at liberty to re-sell; and the deficiency, if any, arising on such re-sale, together with all charges attending the same, should be made good by the defaulter. A. failed in completing his purchase, and, on the

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9th February, 1798, the estate was sold at Garraway's for 2950*l.* On the 14th July, 1798, a commission of bankrupt issued against A.; the vendors attempted to prove a debt of 1300*l.* and upwards, in respect of the difference on the re-sale, and the expenses, including the auctioneer's charges upon the re-sale, interest, moiety of the auction duty, and the auctioneer's and solicitor's charges on the original sale. Credit was given for the deposit†. The commissioners having rejected the proof, the present petition was presented by the vendor. It was resisted on the ground that several of the items composing the account were unascertained when the commission was issued, and, therefore, were not proveable. Lord *Eldon*.—"This is a sale under a contract for the purchase of an estate; by which the purchaser became owner of the estate, and the seller parted with it. The condition, in case the purchaser *should fail to complete his contract, that there shall be a resale, and the purchaser shall make good the loss, and answer the expenses, forms a lien upon the estate for the purchase-money. It is, in some respects, like a mortgaged estate sold to pay the mortgage money, and the residue is the debt to be proved: but, strictly speaking, it is not in the nature of a mortgage; for, if the second sale produced more than the original purchase money, the purchaser who had violated his agreement could not call for an account of the surplus, as if he were really a mortgagor: but the vendor contracts for this, that if the second sale produces less, he shall be considered as a mortgagee, and shall be a creditor for the rest. With respect to the objection to this proof, the difference between the sums produced by these sales is a clear liquidated debt. As to some items of the account, I agree, they could not be proved; but, considering the equity of the vendors, they may have the effect by a circuitous mode. I remember an instance of a mortgage made as an indemnity against acceptances of cash advanced by the mortgagee. Some of the bills had been paid before the bankruptcy; but he was under acceptance of bills floating at the time of the bankruptcy, which were not capable of being proved; but he had a right to model his security, applying it first to those bills which he could not prove. Upon the authority of those cases, then, the vendors in this case have a right to apply the sum produced by the last sale, first in payment of those articles, which it is just they should receive, but which they could not prove under the bankruptcy; and those articles being taken out of that sum will leave the sum capable of being proved. In that circuitous way, therefore, they are entitled to prove. Let the commissioners inquire into those articles; they are to be first satisfied out of the 2,950*l.*, deduct the residue from the

[*403]

As to vendor's claim in respect of a deficiency on a re-sale.

† In none of these cases does any attempt appear to have been made to claim the deposit as forfeited. This part of the stipulation seems to be a nullity.

original purchase-money, and let the balance be proved." See also *Mertens* v. *Adcock*, 4 Espin. 251.

So, in the earlier case, of *Bowles* v. *Rogers*, 6 Ves. 95, n. (31st July, 1800), where the bill was filed against the assignees of a bankrupt, *inter alia*, to compel a specific performance of an agreement made by the bankrupt with the plaintiff, as trustee, for the purchase of certain estates; or, if the defendants should be unable or unwilling to perform the contract†, that the estates might be re-sold; and if the purchase-money arising by the re-sale, together with the deposit, should not amount to 37,240*l.*, the original purchase money, that the plaintiff might be admitted a creditor under the commission for the amount of the deficiency.

Upon the 17th November, 1797, a decree was made for a resale; the *deficiency upon that re-sale was 5,016*l.*; and the cause coming on for further directions, the Lord Chancellor directed that sum to be proved under the commission, saying, the whole purchase-money was the debt, and the vendor had a lien upon the estate, which proving, by the re-sale, deficient, the residue was to be proved under the commission. And in the case of *Ex parte* Lord *Seaworth*, 19 Ves. 235, where the vendor had obtained a judgment for the whole amount of the purchase-money at law, the deficiency arising on a re-sale was held to be proveable.

[*404]

It does not appear that, in the two last cases, there was any special condition entitling the vendor to re-sell the estate, and claim the deficiency. Lord *Eldon's* observation in *Ex parte Hunter*, that the condition in question forms a lien for the purchase-money, might seem to imply, that, without such a stipulation, the vendor would have no lien on the estate for his unpaid purchase-money; but this is not the case, and could not have been meant to be laid down by his Lordship. The rule is, that a purchaser has a lien on the estate for his purchase-money, not only before, but, which is much stronger, after the execution of the conveyance. See Sugd. Vend. 551.

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† By the recent bankrupt act (6 Geo. 4, c. 16, s. 76) if the assignees do not elect whether they will abide by or abandon the agreement, the vendor may petition the Chancellor, who may make such order therein as he should think fit. This enactment does not seem to interfere with the vendor's right to re-sell the estate, and prove for the deficiency.

CONDITIONS OF SALE OF LEASEHOLDS.

CONDITIONS *of* SALE *of* LEASEHOLDS, *which are divided into* SEVERAL LOTS, *the whole being held by* ONE LEASE *at an entire Rent.*

THAT the highest bidder shall be the purchaser, and if any dispute shall arise as to the last or best bidder, the lot in dispute shall be put up again and re-sold.

II. That no person shall advance less than 5*l.* at each bidding, or retract his or her bidding.

III. That each purchaser shall pay immediately to the auctioneer one moiety of the auction duty, and a deposit of 20*l. per cent.* on the amount of his or her purchase-money, and sign an agreement for payment of the remainder on or before the —— day of —— next, all out-goings to which time will be cleared by the vendors, and possession given on completing the purchases; but should any delay arise, from any cause whatever, to prevent the purchases being completed at the time specified, the purchasers shall pay interest
[*405] at the rate of 5*l. per cent. per* **annum*, on the remainder of their purchase-money, from that time until the purchases respectively shall be completed, without prejudice, nevertheless, to the right reserved to the vendor by the last condition.

IV. That the vendor shall deliver abstracts of title, commencing with the indenture of lease of the —— day of ——, to the respective purchasers, who shall prepare the requisite deeds of assignment at their own expense.

V. That all attested copies which may be required shall be prepared by the vendor's solicitor, at the expense of the person requiring the same. The nature of the covenants in the lease may be ascertained by the perusal of an abstract thereof, which will be produced at the place of sale (*a*).

Covenants in the lease should be described, or an abstract furnished.

(*a*) As much uncertainty exists in regard to what are *usual* covenants in a lease, (*vide ante*, Vol. 1, p. 24, Vol. 5, p. 137), it is better not merely to describe the covenants as being of this character, but either to specify

CONDITIONS OF SALE OF LEASEHOLDS.

VI. That each of the respective purchasers shall, on the completion of the purchase, at his own expense, execute to the vendor a bond for the sum of £——, conditioned for indemnifying the vendor against the rent and covenants of the lease, in respect of the premises purchased by and assigned to such purchaser (*b*).

VII. That inasmuch as both the messuages now offered for sale are included in one lease, subject to an entire rent of 18*l.*, of which rent it is intended that each of the said messuages shall bear one moiety, the purchaser of each lot shall enter into a covenant with the purchaser of the other lot for the payment and performance of his (the *covenantor's) proportion of the rent and covenants, and give to such other purchaser a power of distress upon the premises purchased by the covenantor, as an indemnity against such proportion (*c*); of which deed of indemnity two parts shall [*406]

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what they are, or, which is more convenient where the covenants are numerous, give the purchaser an opportunity of informing himself upon the point, by the perusal of a copy or abstract of the lease at or previously to the sale. This avoids disputes, which otherwise frequently arise, as to whether particular covenants (such as the covenants to insure against fire, not to underlet or exercise certain trades or *any* trade, &c.) do not impose obligations or restrictions of which the purchaser should have been apprized.

(*b*) A covenant to this effect is frequently inserted in the deed of assignment, but as that deed is delivered up to the purchaser, a bond or covenant by a separate deed is to be preferred. (See a precedent of such a bond, *ante*, Vol. 4, p. 309). The object of the condition is to provide at whose *expense* the additional instrument is to be executed, this being generally the principal point of dispute.

(*c*) See the precedent of a deed for carrying into effect this arrangement, *ante*, Vol. 4, p. 290.

As to the apportionment of the rent, and giving the assignees mutual powers of distress.

The present condition, and the precedent referred to, are adapted only to the simple case of an apportionment between two. In this case the person obliged to pay more than his share has merely to levy the excess upon the other. Where the number of assignees is more than two, the arrangement is rather more complex. In such case, the deed should either provide that an assignee, who has paid more than his share, shall levy the excess upon his co-assignees according to the respective shares only in which they are bound to contribute; or, if the assignee is entitled to distrain for the *whole* of *his* excess upon any one of the others, the deed

CONDITIONS OF SALE OF LEASEHOLDS.

be executed, one for each of the purchasers, and the same shall be prepared at their joint expense.

VIII. That the lease and assignments shall be delivered to the purchaser of the lot which shall be sold at the larger price, who shall enter into a covenant for their production with the other purchaser, at the expense of the latter; and if the price of the respective lots shall be equal, the purchaser of Lot 1 shall, for the purposes of this condition, be considered as the larger purchaser.

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should give the assignee thus distrained upon a similar remedy over against the others with respect to the excess levied upon him, and so on, *toties quoties*. The result in both cases in effecting an equal distribution of the rent is the same, but the former seems to be the preferable mode, because it produces a more complete equality in the distribution of the costs; for, as each successive distress is attended with costs, which are not borne by the persons who have already paid their proportion and availed themselves of their remedy, the effect is to give such persons an unfair advantage relatively to those who are subsequently called upon. Thus, if four messuages are built on a piece of ground which is demised at an entire rent of 20*l.*, and they are sold to A., B., C., and D. respectively, with an agreement that each is to bear 5*l.* of the rent, and cross powers of distress are given to them respectively in the manner suggested; if the lessor distrains upon A. for 20*l.*, A. would be entitled to levy on any co-assignee, (say B.), for 15*l.* and three-fourths of the costs he has paid to the lessor; and B. would be entitled to distrain upon C. not only for two-thirds of the sum levied upon him, but also for two-thirds of the costs of A.'s distress, in which A. does not participate; and C. would be entitled to levy one-half the sum paid by him upon D., *who would bear exclusively the costs of the distress made upon him.* It seems, therefore, more fair, that the claim of each assignee against the others should be restricted to their respective contributory shares. Of course, the inequality as to costs above noticed might be prevented, by making them leviable upon all the assignees, as well those who have paid as those who have not; but this is rarely done.

Sometimes, where premises comprised in one lease are sold in several lots, instead of each purchaser taking an assignment of his part, it is provided, that one of the purchasers, (usually the largest), shall take an assignment of the whole from the vendor, and grant under-leases to the others. This, however, does not supersede the necessity of giving the under-lessees cross powers of distress, and seems, on the whole, to be a less eligible plan than that of assigning to the purchasers their respective proportions.

CONDITIONS OF SALE OF LEASEHOLDS.

IX. That, if either of the lots shall remain unsold, then the vendor shall be considered as standing in the place of, and shall have the privileges which are hereby given to, the larger purchaser (*d*).

X. That if any error or mistatement shall be made in these particulars, the same shall not annul the sale, but a proportionate allowance, estimating the value at the purchase-money (*e*), shall be made by the vendor or purchasers, as the case may require, such allowance or compensation to be ascertained by a reference in the usual way (*f*).

Lastly. That if any purchaser or purchasers fail to comply with these conditions, the deposit-money shall be forfeited, and the vendor shall be at full liberty to re-sell the lot or lots sold to such purchaser or purchasers, either by public auction or private contract, and the deficiency, if any, arising on such second sale, together with all charges attending the same, shall be made good by the defaulters at this present sale, as and for liquidated damages; and it shall not be necessary for the vendor previously to tender assignments to the purchasers (*g*). [408]

Vendor to have the option of delivering up the deeds.

(*d*) Sometimes a vendor, influenced by such considerations as have been suggested in a former place (*vide ante*, p. 372), may prefer delivering up the deeds, and taking, instead of giving, a covenant for their production. In such case the following addition may be made to the condition:—

"Unless he should prefer delivering up the lease and assignments aforesaid to the purchaser, in which case he shall be at liberty so to do, and to call upon such purchaser for a covenant for their production at his expense."

(*e*) This seems to be the true principle in ascertaining the amount of the compensation.

(*f*) As to the convenience of naming a referee, see an observation *post*, p. 445.

(*g*) As to this condition, *vide* observations *ante*, p. 402.

CONDITIONS OF SALE OF FREEHOLDS.

CONDITIONS *of* SALE *of a* FREEHOLD ESTATE, *where the* TITLE *is* NOT INVESTIGATED BEFORE *the* SALE (*a*).

THAT the highest bidder shall be the purchaser; and if any dispute arise between two or more bidders, the premises shall be immediately put up again.

II. That no person shall advance less than £—— at each bidding, or retract his or her bidding.

III. That the purchaser shall pay to the auctioneer (*b*),

(*a*) It is scarcely necessary to observe that *all* the stipulations introduced into this precedent are not exclusively adapted to such a case. Those only which authorize the vendor to vacate the contract are of this nature.

Auctioneer the stakeholder of the deposit.

(*b*) The auctioneer is the stakeholder of the deposit between the parties pending the execution of the contract. See 3 Mer. 84. If the purchase is completed, it belongs to the vendor as part of the purchase-money; if the contract is rescinded, it is the property of the purchaser, and may be recovered by him in an action against the auctioneer, though the latter has paid it over to the vendor in ignorance of the existence of any obstacle to the completion of the purchase; *Gray* v. *Gutteridge*, 1 Mann. & Ryl. 614; *a fortiori* where he has paid it over, knowing the title to be defective. *Edwards* v. *Hodding*, Marsh. 377. As the auctioneer holds the money as a depositary merely, and is not entitled to employ or invest it, he is not liable to pay interest, unless, perhaps, where it can be proved he has employed or invested it, or unless he withholds it after demand. See *Lee* v. *Munn*, 1 J. B. Moore, 481; S. C., 8 Taunt. 45; *Gaby* v. *Driver*, 2 You. & Jer. 549; *Curling* v. *Shuttleworth*, 3 Moore & Payne, 383. But interest on the deposit may be recovered in an action against the vendor, as special damage. *Farquhar* v. *Farley*, 7 Taunt. 592. The auctioneer, however, though a stakeholder for both parties, is not to be considered as the agent of both; he is exclusively the agent of the vendor who nominates him, and on whom any loss arising from his insolvency would fall. See Sir *W. Grant's* judgment in *Fenton* v. *Browne*, 14 Ves. 150. The purchaser's ordinary remedy for the recovery of the deposit is an action at law. But if the vendor files a bill in equity to have the contract rescinded, the Court, in decreeing in his favour, will

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By what means the deposit is recoverable by the purchaser.

immediately after the sale, a moiety of the auction duty, and a deposit in the proportion of 20*l.* for every 100*l.*, of his or her purchase-money, and sign an agreement for payment of the remainder of such purchase-money on or before the —— day of —— next; and if, from any cause whatsoever, the purchase should not then be completed, the purchaser shall pay interest at the rate of 5*l. per cent. per annum* on the remainder of the purchase-money from that time, until the purchase shall be completed, without *prejudice, however, [*410] to the vendor's right, under the last condition, to re-sell the estate if he shall think fit.

CONDITIONS OF SALE OF FREEEHOLDS.

direct him to return the deposit, deducting costs. *Mackreth* v. *Marlar*, 1 Cox, 259. Formerly, however, when a vendor's bill for specific performance was dismissed on account of a defect in the title, the Court invariably refused to make such order, the effect being to decree relief. *Bennet College* v. *Carey*, 3 B. C. C. 390. And where the purchaser, being plaintiff, failed in such a suit, the Court refused an application by him to have his deposit set off against the vendor's claim for costs, and the surplus if any returned to him. *Williams* v. *Edwards*, 2 Sim. 78. In a very recent case, however, in which a vendor's bill for specific performance was dismissed, the defendant pressed for an order, directing the return of the deposit, contending, that the plaintiff, by filing his bill, had given the Court jurisdiction over him with respect to the deposit, and that he (the defendant) ought not to be exposed to the vexation of bringing an action; and it was said, that Lord *Eldon* had made such an order. The plaintiff objected that the deposit was in the hands of the auctioneer, who was not a party to the suit. The defendant then proposed, that the Court should grant an order, directing the plaintiff to concur with the defendant in an authority to the auctioneer to pay the deposit to him, which the Court seemed disposed to do; but the plaintiff consenting to join in the authority to the auctioneer as proposed, no order was made. *Bryant* v. *Busk*, 4 Russ. 5. And in a still more recent case (with a note of which the editor has been favoured), the present Vice-Chancellor, Sir *L. Shadwell*, on dismissing a vendor's bill for specific performance, made an order for the return of the deposit, citing a case before Lord *Eldon*, (probably the same which was referred to in *Bryant* v. *Busk*), in which it had been done. *Anson* v. *Hodges*, Dec. 1831. It should be noticed, that a purchaser is never compelled to pay interest on the deposit, though it has been locked up from the vendor in consequence of a suit rendered necessary by his (the purchaser's) raising to the title objections which were adjudged to be untenable. *Bridges* v. *Robinson*, 3 Mer. 694.

Purchaser not liable to interest on deposit.

CONDITIONS OF SALE OF FREEHOLDS.

IV. That the vendor shall deduce a good title to the premises sold, but the expense of all attested copies of deeds, and covenants for the production of the same, that shall be required, shall be borne by the purchaser.

V. That if a valid objection shall be made to the title, within one calendar month after the delivery of the abstract, the vendor shall be at liberty to rescind the contract on returning to the purchaser his deposit (without interest), and his moiety of the auction duty, in full satisfaction of the claims of such purchaser: but all objections to the title not made within the period aforesaid, shall be considered as waived (*c*).

Effect of condition enabling the vendor to rescind the contract, if a title cannot be made.

(*c*) The object of this condition is to exclude the purchaser's claim to be reimbursed his expenses in investigating the title, in case it proves to be defective, to which he would otherwise clearly be entitled. *Kirtland* v. *Pounsett*, 2 Taunt. 146; *Turner* v. *Beaurain*, Sugd. Vend. 8th ed. 224†. It also prevents his claim to damages, which is likewise a material point, because, though it has always been considered, upon the authority of the case of *Flureau* v. *Thornhill*, 2 Blacks. 1068, that a purchaser could not recover damages for the fancied goodness of his bargain, the Judges of the Court of King's Bench in a late case doubted this doctrine, and were of opinion, at all events, that it did not extend to protect a person who entered into a contract for sale, before he had himself obtained his conveyance. In such a case, they thought that he was liable to an action, on account of his inability to make a title. *Hopkins* v. *Grazebrook*, 6 Barn. & Cress. 31. *A fortiori*, are damages recoverable against a person who has incapacitated himself from completing his contract, by subsequently selling and conveying the estate to another person. *Denton* v. *Stewart*, 1 Cox, 258. If, in such a case, the second purchaser bought with notice of the prior contract, he would of course be bound by the equitable title of the prior purchaser. But if a person enters into a parol contract for the sale of an estate to A., and then contracts in writing to sell the same estate to B., and subsequently makes a conveyance in pursuance of the first contract to A., who has notice of the second contract,

Whether damages for the loss of the bargain be recoverable by the purchaser.

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† Where a vendor has incurred expense in endeavouring to remove untenable objections to a title, which a purchaser has advanced, and the purchaser afterwards makes a farther objection, which is insuperable, and the contract is abandoned, he ought, it seems, to allow the vendor the expenses incurred in endeavouring to remove the first objections, before the fatal objection was advanced. See *Deverell* v. Lord *Bolton*, 18 Ves. 515.

VI. That the purchaser shall have a proper conveyance, at his own expense, according to the third condition; but

CONDITIONS OF SALE OF FREEHOLDS.

the Court will not compel A. to re-convey the estate; for, though the execution of a parol contract cannot be enforced, on account of the statute of frauds, yet such a contract may be used for defensive purposes, being equally binding on the conscience of the party; and A., having a prior equity under his parol contract, notice to him of the second contract, when he took his conveyance, was immaterial. See *Dawson* v. *Ellis*, 1 Jac. & W. 524.

The condition in the text should be inserted as a matter of course, when the vendor sells without a previous investigation of his title. Where such investigation has been made, and has disclosed a defect, the propriety of its introduction is more questionable, since, in such a case, it is scarcely fair to put a purchaser to the expense of investigating the title, when probably, if he had been made acquainted with the facts, he would not have entered into the contract.

Condition that vendor may rescind the contract, if evidence not in his possession is required.

Sometimes it may be prudent for a vendor to arm himself with a still more considerable power, namely, to rescind the contract in case evidence should be required which is not in his possession; for it may happen, in a very small purchase, that the expense of procuring evidence to substantiate the title, would be nearly equal to the purchase-money. The condition may then be as follows:—

"That if the purchaser shall be dissatisfied with the title deduced by the vendor, or shall require evidence in support thereof, not in the possession of the vendor, the vendor shall be at liberty to rescind the contract on repaying to the purchaser the sum paid by way of deposit, without interest, in satisfaction of all claims and demands whatsoever."

But though a condition to this effect may be desirable, where the vendor is obliged to sell without a previous examination of the title, yet the latter is much the more satisfactory course, as the title may prove, upon examination, to be free from all objection; in which case an unfounded suspicion, (for such conditions have always the effect of creating suspicion), will have been produced by the condition in question.

Declaration that contract shall be void if a good title cannot be made, how construed.

Where the terms of the condition are, that, in case a good title cannot be made, the contract shall be void, the question has sometimes been raised, whether this absolutely vacates the contract, or leaves the purchaser at liberty to accept the title if he pleases. The latter position was strenuously maintained in the case of *Roberts* v. *Wyatt*, 2 Taunt. 277, in which the point incidentally was brought into discussion in an action of

CONDITIONS OF SALE OF FREEHOLDS.

the expense of any fine or common recovery that may be necessary shall be borne by the vendor (*d*); but the expense

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trover by the purchaser to recover the abstract of title, which, pending the completion of the contract, had been returned to the vendor, the defence being, that the contract, in consequence of a defect of title, was altogether void, and the action, therefore, not maintainable. The words of the clause in question were, "that if the vendors could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the purchase-money on the appointed day, the agreement should be utterly void, it being the intention of the parties that no action or suit in equity should be brought thereon." Lord Chief Justice *Mansfield* said, "The meaning is, that if the seller cannot make a good title by the time mentioned, the contract shall be void *as against him*, and the plaintiff *(the purchaser)* has a right to be off his bargain. So, *è contra*, if the plaintiff does not pay the money, the defendant may avoid the contract; but the plaintiff cannot say, 'I am not ready with my money, therefore I will avoid the contract; *nor can the seller say, 'my title is not good, therefore I shall be off.'*" In accordance with this principle, though not so exactly in point, is the now well-established doctrine, that a clause in a lease, declaring it to be void on breach of covenant by the lessee, only makes it void at the option of the lessor. (*Vide ante*, Vol. 4, p. 360).

In the late case of *Williams* v. *Edwards*, 2 Sim. 78, however, a different rule seems to have been laid down. A., the assignee of a bankrupt, agreed

By whom the expense of fines and recoveries is to be borne.

(*d*) Though a fine or common recovery, where the uses are declared by the purchaser's deed of conveyance, are, properly speaking, parts of his "conveyance," yet it is clear, that a stipulation, that the purchaser shall be at the expense of the conveyance, would not extend to these extraordinary assurances, the necessity of which arises from a defect in the vendor's personal capacity or estate to convey by the ordinary modes of assurance. Perhaps, indeed, the purchaser is not bound in his deed of conveyance to declare the uses of the fine or recovery, though in practice it is usual to do so, less frequently, however, in regard to recoveries than fines, because the uses are generally (though not necessarily) declared by the deed creating the tenant to the *præcipe*, which must precede the recovery. With respect to a fine, a purchaser cannot fairly object to declare the uses in his conveyance, unless it would greatly add to its length and complexity by leading him into a history of the early title.

Where the conuzors in the fine are the only conveying parties, the purchaser's deed need not be more than a declaration of the uses of the fine, and the expense of a lease for a year may be avoided.

of declaring the uses of such fine, and of the conveyance or assignment of any satisfied term or other outstanding trust estate, shall be borne by the purchaser.

CONDITIONS OF SALE OF FREEHOLDS.

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to sell to B. the fee-simple in two-thirds, and the life estate in one-third, of freehold and copyhold property, and engaged to furnish an abstract of his title within one calendar month; and, on payment of the remainder of the purchase-money on a certain day, to execute a conveyance; and it was stipulated that errors in the description should not vacate the agreement, but *that an abatement or equivalent should be made or given. The [*413] contract contained the following clause: "If the counsel of the said B. shall be of opinion that a marketable title cannot be made by the time hereby appointed for the completion of the purchase, this agreement shall be void, and be delivered up to be cancelled." It turned out that the bankrupt had a life interest only in the freehold property. The purchaser filed a bill, praying a conveyance of all the vendor's interest, *and an abatement*. The Vice-Chancellor dismissed the bill with costs. "This particular clause in the agreement," said his Honour, "I must take to be the contract both of the vendor and the purchaser. They might both think that it would be equally to their interest that the agreement should be put an end to, if the counsel of the purchaser should be of opinion that a marketable title could not be made. There appears to be nothing unreasonable in that. There might be circumstances which might make it very proper for both parties to insert that term; and, as it was the contract of both the parties, this Court cannot make a new contract for them. The parties themselves have stipulated that, in a given event, which happened, the agreement should be void. My opinion is, that if parties make a contract in this very specific manner, the Court which is to compel the specific performance of the contract between the parties, is bound by the terms of the agreement between them; and, therefore, the purchaser is asking to enforce an agreement which he has himself agreed should, under certain circumstances, be void."

Sir Edward Sugden considers this case to establish, that a purchaser has no right to elect to take a bad title where the contract stipulates that it shall be void if the purchaser's counsel is of opinion that a good title cannot be made to the estate. Sudg. Vend. 8th ed. 276†.

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† In another part of his valuable work, p. 383, Sir Edward Sugden cites this case as an authority for the proposition that time may be made the essence of the contract. Though this doctrine is now undeniable, yet it is submitted, with great deference, that this case is no authority for it, as the objection was not of a nature which length of time would remove. There was an absolute want of title to the reversion of one-third of the estate.

CONDITIONS OF SALE OF FREEHOLDS.

VII. That the auction duty of seven-pence in the pound shall be paid by the vendor and purchaser in equal proportions immediately after the sale.

It is observable, that neither the learned Judge who decided, nor the learned and distinguished author who has referred to this case, has adverted to the fact that the plaintiff claimed not merely to take the title as it was, but to take it with compensation. Perhaps, however, this circumstance was entitled to some attention, and renders it possible to support the decision, without going the whole length of the doctrine advanced in it. According to Sir *James Mansfield's* doctrine in *Roberts* v. *Wyatt*, the vendor himself could not, under such a condition, make the infirmity of his title a ground for resisting the performance of the contract. At the first impression, a plausible objection to this view of the case is, that it renders the stipulation nugatory; as the contract would, without the clause in question, be void as to the purchaser, if the title were bad: but this is not the only alternative; it might have been designed to prevent precisely what was attempted to be done in the case of *Williams* v. *Edwards*, namely, to compel the vendor to convey any part of the land to which he had a clear title on allowing a compensation for the rest, which might be less advantageous to him than conveying the whole at the entire price; he might choose not to sell, if his title was such that he should be compelled to take less. Another object of the condition might be, to exclude the purchaser's claim to damages, or the reimbursement of his expenses, in case the vendor could not make a title. We are not, therefore, in order to give *some* effect to the stipulation, driven to the conclusion, that it must have been intended to invest the vendor with the power of avoiding the contract in the teeth of the purchaser's offer to accept the title as it was. The difficulty in the Vice-Chancellor's doctrine is, that it enables a party to profit by his own wrong; his incapacity to make a title might arise from his own act; and it is scarcely possible to conceive the existence of such a case as his Honour suggests, in which it would be less for the interest of the vendor to convey a bad title than a good one; or, in other words, in which it might be advantageous for a vendor, if his purchase-money were not diminished, to reserve to himself the power of declaring to the purchaser—"I will not convey to you unless I have a good title, though you may be disposed to take it;" and as the purchaser in *Williams* v. *Edwards* did not offer to complete on these terms, the case does not decide what would be the determination in such an instance. It suggests, however, the propriety of explicitly declaring the intention of the parties on the point; and, therefore, to the condition in the text, may be added—

"but the purchaser, notwithstanding this condition, shall be at liberty to accept the defective title if he thinks proper."

VIII. That if any mistake be made in the description of the property, or of the vendor's interest (*e*) therein, such mis- CONDITIONS OF SALE OF FREEHOLDS.

If the contrary be intended, say—

"And it is declared that this condition shall enable the vendor to insist upon the abandonment of the contract on account of his want of title, though the purchaser shall be willing to accept it."

Erroneous description of the vendor's interest generally discharges the purchaser.

(*e*) In general, a variance between the interest contracted to be sold, and the vendor's actual interest, is a ground for the Court's refusing to force the estate upon the purchaser, and is not a subject for compensation. Thus, if a person sells a leasehold house for a term of sixteen years, and it turns out that he has only six years, the Court will relieve the purchaser from the bargain; *Long* v. *Fletcher*, 2 Eq. Ca. Ab. 5, pl. 4; but if the difference were inconsiderable, it should seem the purchaser would be bound to accept a compensation. *Guest* v. *Homfray*, 5 Ves. 818; and other cases cit. Sugd. Vend. 8th ed. 266. And the Court will not compel a purchaser who has contracted for the inheritance to take a long term of years; *Drewe* v. *Corp*, 9 Ves. 368; or a copyhold instead of a freehold; *Twining* v. *Maurice*, 2 B. C. C. 326; or even a term of 500 years instead of a term of 1000 years; *Stephens* v. *Bridges*, 6 Madd. 66; for, in these cases, the interest, though not, perhaps, substantially less valuable than that contracted for, is different. Still less would a purchaser who has bought the entirety be obliged to take an aliquot share, as six-sevenths. *Dalby* v. *Pullen*, 3 Sim. 29. Much laxity in regard to questions of this nature at one period prevailed in Courts of equity; but those Courts are now more disposed to adhere to the sound and reasonable maxim, that if the vendor has not the specific subject which he contracted to sell, he has no right to enforce the performance of the contract. Thus, Lord *Eldon* has repeatedly determined that a person contracting to purchase an estate tithe free, is not bound to take an estate subject to tithes with a compensation. *Ker* v. *Clobery*, Sugd. Vend. 8th ed. 272. And even where the contract contained the usual stipulation, that errors of description should not vitiate the sale, his Lordship was of opinion, that, if the greater part of the estate was described as tithe-free, the purchaser could not be compelled to take it, if there was no such exemption; *contrà*, if a small part only were so described; *Binks* v. Lord *Rokeby*, 2 Swanst. 222; or if the circumstances, under which the contract was entered into, shewed that the purchaser was not intent on purchasing a tithe-free estate. *Smith* v. *Tolcher*, 4 Russ. 302. A contract to sell an estate tithe-free would be satisfied by making out a title to the tithes *in pernancy*. Of course, a person who has contracted to purchase an estate of inheritance in possession cannot be compelled to accept compensation for a lease for life, discovered to belong to a third person, in a considerable part of it. *Collier* v. *Jenkins*, 1 Younge, 295.

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take shall not annul the sale; but a compensation or equivalent shall be given by the vendor or the purchaser, as the case may require, such compensation or equivalent to be settled by two referees, or their umpire; one referee to be nominated in writing by each party within one month after the discovery of such error, and notice thereof given to the other party; and in case either party shall neglect or refuse to nominate a referee within the said time, the referee of the other party may proceed alone.

[*416] *Lastly*, That if the purchaser shall neglect or fail to * comply with the above conditions, his or her deposit-money shall be actually forfeited to the vendor, who shall be at liberty to re-sell the estate, with or without notice, either by public auction or private contract, and the deficiency (if any) occasioned by such second sale, together with all expenses attending the same, shall, immediately after the re-sale, be made good by the defaulter or defaulters at this present sale; and in case of the non-payment of the same, the whole thereof shall be recoverable by the vendor as and for liquidated damages, without previously tendering any conveyance to the purchaser.

Effects of a misrepresentation by vendor.

With respect to errors of description in general, it is to be observed, that though equity will not enforce performance where there is a material variation, yet some allowance will be made for the exaggeration of praise usually bestowed by a vendor upon his commodities.

Thus, to describe a piece of land imperfectly watered as uncommonly rich water meadow has been held to be not such a misrepresentation as to bar the vendor's right to a specific performance of the contract; it being considered that the words were to be confined to the quality of the land, in which sense they professed to be nothing more than the loose opinion of the auctioneer, upon which the vendee ought not to have placed any reliance. *Scott* v. *Hanson*, 1 Sim. 12.

But where, on the sale of a life interest, it was described as being held on the life of a healthy gentleman, whose life was insurable, specific performance was refused against the purchaser on account of the fact of an insurance being only to be effected at an extraordinary rate of premium, though such rate was below that which the auctioneer in writing guaranteed that an insurance should be effected; the Court being of opinion that this did not do away with the description in the particulars, but was merely stated with a view to enable persons to make their calculations. *Brealey* v. *Collins*, 1 Younge, 317. See numerous cases on this subject, Sugd. Vend. 8th ed. p. 283.

CONDITIONS *of* SALE *of* FREEHOLD *and* COPYHOLD FARMS, *part of which is* IN HAND, *and part in the Occupation of* TENANTS, *sold in several Lots.*

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THAT the highest bidder for each lot shall be the purchaser; and if any dispute arise between two or more bidders, the lot in dispute shall be put up again at the former bidding, and re-sold.

II. That no person shall advance a less sum at each bidding than shall be named by the auctioneer at the time of putting up each lot, nor retract his or her bidding.

III. That the auction duty shall be paid in equal moieties by the vendor and purchasers.

IV. That each purchaser shall pay into the hands of the auctioneer, immediately after the sale, a deposit of 20*l. per cent.* in part of his or her purchase-money, together with his or her moiety of the auction duty, and sign an agreement for completing the purchase, and for payment of the residue of his or her purchase-money, on or before the —— day of ——, at which time the purchases are to be completed, and the respective purchasers are then to have the actual possession of the lots in hand, and to be let into receipt of the rents and profits *of the other lots. All outgoings will be cleared [*417] by the vendor to the —— day of ——.

V. That the vendor, at his own expense, will deliver abstracts of his title to the respective purchasers, or their solicitors, within fourteen days from the day of the sale, and deduce a good title for sixty years only, subject to these conditions; and, on payment of the residue of the purchase-money agreeably to the fourth condition, will, at the expense of the respective purchasers, execute to them proper conveyances, surrenders (*a*), assignments, and assurances;

(*a*) Purchasers of copyholds, even in the absence of express stipulation must bear the expense of the surrender, admission, and fine. See Sugd. Vend. 8th ed. 388

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but in case the completion of the several purchases should not take place on the said —— day of ——, the respective purchasers shall pay interest at *5l. per cent. per annum* on the residue of their purchase-money, from that time up to the time of actually completing each such purchase.

VI. That the purchasers shall bear the expense of their own examination of the court rolls of the manors, and of any special courts which may be necessary, and also of the production of muniments of title, and copies of such muniments not in the vendor's possession, and of any travelling or other incidental expenses attending the examination thereof (*b*), and the costs of procuring any attested or other copies or extracts of wills, deeds, fines, or other documents which they may require for the purpose of verifying the abstract or otherwise, and of any deeds of covenant for the production of the same; and the vendors shall not be required to produce evidence of the common rights.

VII. That the vendor shall not be required to produce any evidence of title to Lot — prior to certain indentures of
[*418] lease and release of the —— and —— of ——, *18—, although any prior deeds or other documents may be recited or noticed in the abstracted deeds; nor, as to Lot —, prior to the award of the commissioners of the —— inclosure act, which award bears date on or about the —— day of —— (*c*).

As to expenses attending the examination of deeds.

(*b*) The rule is, that if any deeds are in the possession of a third person at a distance, the purchaser's attorney must attend for the purpose of examining the deeds, but the vendor pays the expense of his journey. *Sharpe* v. *Page*, Rolls, 1815, Sugd. Vend. 8th ed. 387. The condition in the text would throw this expense upon the purchaser.

As to titles under inclosure acts.

(*c*) An allotment under an inclosure act is no evidence that the person to whom it was made was seised in fee, as such allotments may be, and frequently are, made to tenants for life, or other owners of partial estates. Great difficulties in titles derived through inclosure acts frequently arise from the impossibility of determining in respect of which part of the lands or common rights, belonging to the allottee at the time of the inclosure, any given portion of the allotment was made. Thus, if a person have several open pieces of land, held under distinct titles, and an allotment be made to him in general terms in lieu of all his lands in the parish, unless it can be shewn what part of the allotment was made in respect of each piece of open land, it is obvious that no title can be made to *any* part of

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VIII. That the conveyance, assignment, or surrender, of any outstanding estate, term, or interest, which has not been noticed for the last thirty years, and the obtaining of any probate, administration, or other document, required for that purpose, or for evidencing the title thereto, shall be at the expense of the purchasers requiring the same; and recitals of descents, deaths of parties, payment of money, heirships, intestacies, and other facts, in deeds or court rolls, twenty years old and upwards, shall be deemed sufficient evidence of such facts; and where, on account of any part of the property having been conveyed under a general description (*d*), or hedges having been removed, or otherwise,

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the allotment without deducing the title to the whole of the lands which were subject to the inclosure; and an incumbrance or defect of title affecting any portion of the inclosed lands will attach to the *whole* of the allotment, on account of the impossibility of distinguishing the exempted parts. Sometimes the surveys and papers in the hands of the clerk of the peace furnish the requisite information, but frequently they are not accessible. If the title to all the lands of the owner in question, which were subject to the operation of the act, be well deduced (evidence of course being given that the lands to which a title is shewn *were* all the lands), the title to every part of the allotment will be free from objection.

Evidence of identity frequently defective.

(*d*) There is no point in which titles are so generally defective as in evidence of indentity. The early deeds frequently contain no other than a general description, or, which is still more unsatisfactory, the names and contents of fields specified in them are no longer applicable, and probably had ceased to be so long before they were disused, conveyances being usually prepared by persons who are not locally acquainted with the property, and who continue to convey the lands by the old description, without noticing the changes of names and boundaries, (which almost every estate gradually undergoes), until at length there is very little or no apparent connection between the lands described and the lands intended to be conveyed. Recourse must then be had to parol evidence of identity, and how defective this evidence commonly is, every day's experience attests. The evil would, in a great measure, be prevented, if, in preparing conveyances, care was taken to notice the alterations of this nature which have occurred since the last conveyance of the property.

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General description of copyholds on court rolls held to be sufficient.

In a very recent case, an objection to a title of copyholds, on account of the vagueness of the description on the court rolls, and its alleged inadequacy to comprise the lands in question, was over-ruled. The court rolls described the property as "one messuage and half yard land, con-

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evidence of seisin or identity, or of the boundaries dividing the freehold and *copyhold lands, is not afforded on the face of the deeds or court rolls, an affidavit of the possession or
[*420] receipt of the rents for forty years and upwards, according to the title deduced, or of the identity of the premises, shall (in any case not specially provided for by these conditions) be deemed sufficient evidence of seisin or identity, and the vendor shall not be obliged to distinguish the boundaries of the manor of [A.].

IX. That the vendor shall not be required to produce

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taining ten acres, two tofts of land, one messuage, and one yard land one cottage, with a garden, two acres of arable land and pasture, one croft and one close containing twenty-one acres, and one close containing twelve acres, and the rents of the Buddle of Chilcombe." The description in the contract for sale was, "all that capital messuage, tenement, or farm-house, barns, stables, cart-houses, sheds, out-buildings, farm-lands, hereditaments, and premises, situate at Moorstead, in the county of Southampton, as the same are now in the occupation of Bunny, as tenant of Walter Long, containing, by admeasurement, 219 acres, more or less." The purchaser, by computing the messuage and half yard land at ten acres, the two tofts at two acres, the messuage and one yard land at twenty acres, the cottage and garden, and two acres of arable land and pasture at two acres, the croft and one close at twenty-one acres, and the other close at twelve acres, attempted to make out that the description of the property on the court rolls covered only sixty-seven acres, or, at most, by some variation in the calculation, seventy-one acres, and could not be made to apply to 219 acres, which were admitted to be, as stated in the contract, in the actual occupation of Bunny as tenant to the plaintiff, (the vendor).

On the part of the plaintiff, evidence was given, that the farm now occupied by Bunny, as tenant to the plaintiff, had passed through a succession of proprietors to the plaintiff by the description which now appeared
[420] on the court rolls, and, under such description, had been held by the occupiers for the time being for upwards of sixty years past.

The Master of the Rolls over-ruled the objection, observing, that the computation of quantity made by the defendant was, in a great degree, fanciful; that the generality and vagueness of descriptions on court rolls were too well known to entitle such a computation to any weight; and that it was well established by the evidence in this case, that the whole property now in the occupation of Bunny, as tenant to the plaintiff, had actually passed and been enjoyed by the description contained in the court rolls. *Long* v. *Collier*, 4 Russ. 267.

any evidence of title to Lot —, other than certain indentures of lease and release by way of mortgage, bearing date the —— and —— days of ——, 18—, and an affidavit by the vendor, that he has been in possession for a period of twenty years and upwards, without having received interest, rendered or kept accounts, or done any other act as mortgagee, and without having been apprized of any claim being made or asserted to the right or equity of redemption (*e*). CONDITIONS OF SALE OF FREEHOLD AND COPYHOLD.

X. That, as some part of Lot —, reputed to be holden of the lord of the manor of ——, appears to be subject to a chief rent of 16*s.* 4*d.*, and a heriot in kind, payable on the death of every tenant, *the said lot is sold subject thereto; but the vendor shall not be obliged to adduce any evidence as to the origin of the said rent. [*421]

XI. That the purchaser shall accept of an assignment of the residue of a term of one thousand years in Lots — and —, which is now vested in a trustee to attend the inheritance for the vendor, as a sufficient protection against the dower of the vendor's wife, such term appearing to have been created long antecedently to his marriage (*f*).

(*e*) Whether a person would be compelled to take a title of this kind is not clear. The objection to it is, that the fact upon which its validity depends, namely, the non-recognition of the mortgage debt, is not susceptible of positive proof, and there may have been disabilities in the mortgagor keeping alive the right of redemption. There is consequently ground to contend, that the case falls within the principle upon which it has been held, that a conveyance by a trader after an act of bankruptcy cannot be forced on the acceptance of a purchaser, although it is asserted, that he owed no debt on which a commission could issue, it being impossible to prove the fact. In *Stephens* v. *Bridges*, 6 Madd. 66, a bill was filed, to enforce the performance of a contract for the sale of an estate held under a mortgage title, but no objection appears to have been made to the title on this ground. *Vide ante*, p. 390. As to mortgage titles.

(*f*) Though the case of *Mole* v. *Smith*, 1 Jacob, 490, stated *ante*, Vol. 1, p. 108, 2nd ed., may be considered to have established that a purchaser is bound to rely upon a term of years as a protection against dower; yet, as the reasons for this proposition have not been satisfactory to the profession, and the point is even now the subject of much dispute between vendors and purchasers, it seems better for a vendor to negative, by express stipulation, the purchaser's right to have a fine levied. The objection to the doctrine of *Mole* v. *Smith* is, not only that it imposes upon Purchaser must rely upon an assignment of term as a bar of dower. [421]

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XII. That the purchaser shall not object to the title of part of Lot —, on account of the possibility of a lady, aged fifty-two years and unmarried, marrying and having issue (*g*).

XIII. That the purchaser shall accept the vendor's bond,

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a purchaser the necessity of keeping on foot the term for the purpose of excluding the dower, but that, if a writ of dower were sued out by the dowress, since she would have judgment for her dower, with a *cesset executio* during the term, the *terre-tenant* (*i. e.* the purchaser) would at least have to pay his own costs. On the other hand, it must be admitted that the probability of such a claim ever being set up is very slight, as it would be attended with expense to the claimant, without the possibility of any compensatory advantage. If, however, there is any ground to presume the surrender of the term, according to the case of *Doe* d. *Putland* v. *Hilder*, 1 Barn. & Ald. 687, and the other cases which have created so much discussion, of course the term is not to be relied on, for this or any other purpose. *Vide ante*, Vol. 6, p. 468.

As to dower being barred by jointure.

Sometimes the dower of the vendor's wife is barred by jointure; in which case, in order to avoid the question, whether a purchaser may claim to investigate the title to such lands, (as to which see Sugd. Vend. 8th ed. p. 338), it will be advisable to insert the following condition:—

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"That, inasmuch as by indentures of lease and release, bearing date the — and — days of ——, certain hereditaments were settled on the vendor's wife for life, in remainder immediately expectant on his decease, in lieu of her claim to dower in any part of his real estate, the purchaser shall rely upon such jointure in bar of dower, and shall not be entitled to require any farther evidence of the vendor's title to the jointure lands than the production of the said indenture of settlement, which will be covenanted to be produced at the expense of the purchaser."

(*g*) Where the age is such, as, according to the ordinary course of nature, to place this event beyond all risk, probably a purchaser would not be allowed to make the *legal* possibility of issue an objection to the title. In *Fraser* v. *Fraser*, 1 Jacob, 586, n., Sir *W. Grant* decreed payment of a legacy, on evidence that the female to whose issue it was given was of the age of fifty-five, and unmarried. In the other cases, where this has been done, the age seems to have been greater. It is frequently provided, that the purchaser shall accept the vendor's bond against a possible but improbable event of this nature. See the following Condition, and note.

(to be prepared by and at the expense of the vendor), in the penalty of 100*l.* against a life annuity of 10*l.* affecting Lot —, the same being also amply secured out of large estates belonging to the vendor (*h*); but which fact it shall not be incumbent on the vendor to prove.

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XIV. That the respective purchasers shall take, at a fair valuation, in the usual way, the timber, timber-like trees, tellers, and pollards, down to 1*s.* *per* stick inclusive, (it being understood that the value of the usual claim of the lord of the manor is to be allowed out of that portion which is growing upon the copyholds (*i*), also all customary tenant's fixtures in the several dwelling-houses and tenements *in hand (*k*); together with the growing crops (if [*423]

(*h*) The general rule is, that a vendor is not bound to give, nor a purchaser to accept, an indemnity. See *Balmanno* v. *Lumley*, 1 Ves. & Bea. 225; and cases cit. Sugd. Vend. 8th ed. 266.

(*i*) To prevent misunderstanding, it ought to be stated what this claim is.

(*k*) Where it is intended that the purchaser shall pay for fixtures, this should always be expressed; for it should seem, that, whatever would descend to the heir, as being fixed to the freehold, though, as between landlord and tenant, belonging to and removable by the latter, would pass to a purchaser with the house, the general rule, regulating what are fixtures, being that which obtains between the real and personal representatives, and not that which prevails between landlords and tenants, which is an exception to the general doctrine, founded on the convenience of trade. In a late case, therefore, where a house was sold without any stipulation as to fixtures, it was held, that the vendor could not afterwards claim any compensation for stoves, cooling coppers, mash-tubs, water-tubs, blinds, &c., which were in the house, especially as he had delivered possession of and conveyed the house without making any such claim. *Colegrave* v. *Dias Santos*, 2 B. & C. 76; 3 D. & R. 255. In this case some of the articles in the house were clearly not fixtures; and Mr. Justice *Bayley* thought, that even these were not recoverable by the vendor after delivering possession of them with the house, as he must be considered as throwing them into the bargain. However, this point was not raised, the plaintiff having, in his particulars of demand, included these articles in the denomination of fixtures, and having thereby, it was held, precluded himself from claiming them as not being such. The question, in regard to fixtures, seldom arises when the premises are tenanted; for, in such a case, all that do not belong to the tenant, and those only, would pass with the house; for, as notice of a tenancy is notice of the terms of it, see *Daniels* v. *Davison*, 16 Ves. 249,

Rule between vendor and purchaser as to fixtures.

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any), the dung and compost, and all articles of husbandry upon the farms and lands in hand, usually appraised by the custom of the country from an outgoing to an incoming tenant; and the purchasers are to pay for the same at the time of completing their purchases.

XV. That the vendor shall be at liberty to hold auction-sales upon the farms and lands in hand, any time prior to the said —— day of —— next; and to use the barns, stabling, yards, &c., till the Lady-day following, for the purpose of threshing out the corn, and carrying off or feeding the hay, straw, and fodder, &c.

XVI. That the purchasers of the larger part in value of any lots held under one title, shall, after the sale of all such lots, be entitled to the custody of the muniments of title now in the vendor's hands, upon entering into the usual covenant for the production thereof to the other purchasers. If any part of such lots shall remain unsold, the vendor shall be entitled to retain the said muniments, upon entering into the covenant aforesaid (*l*); and all such covenants shall be pre-

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Purchaser should inform himself of the terms of any existing tenancy.

the purchaser would probably be considered as bound to inquire what fixtures belonged to the tenant; though, if he were entitled by special contract to more than ordinary tenant's fixtures, it would be more safe, and certainly more fair, in the vendor to state the fact. Indeed, it may be observed generally, that, if the purchaser be apprized of the property being tenanted, he ought, for his own security, to inform himself of the nature of the contract with the tenant, by a perusal of a copy or abstract of the lease or agreement by which he holds; or otherwise to require some notice to be taken of the terms of the tenancy in the contract for sale. Unless one of these precautions be taken, the purchaser, under the rule above adverted to, would be subject to any claims which might be set up by the tenant, by virtue of his lease from, or agreement with, the vendor, without being entitled to any compensation from the vendor on account of the nature of those claims, unless they were made the subject of distinct respresentation on the part of the latter. Of course these observations do not apply to an *expired* tenancy, as where the property is described as *late* in the occupation of, or *late* the residence of A. *Miles* v. *Langley*, 1 Russell & Mylne, 39.

(*l*) Add, if so intended:—

"such covenant to be determinable, nevertheless, on the vendor's parting with the said muniments of title, and pro-

pared by and at the expense of the person or persons requiring the same. CONDITIONS OF SALE OF FREEHOLD AN COPYHOLD.

XVII. That, if any mistake be made in the quantity or contents of the several closes (*m*), or in the relative pro-

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curing the person to whom they shall be delivered to enter into a similar covenant with the person then entitled to the benefit of the covenant which shall be so determined, such substituted covenant to be prepared by and at the expense of the person requiring the same."

(*m*) This condition is affirmative of the ordinary rule, which is, that the purchaser is entitled to compensation for a deficiency of quantity. Thus, where the particular described certain woods as consisting of 217 acres and 10 perches of statute measure, and it turned out that the quantity was 191 acres only. Sir *W. Grant*, M. R., held the purchaser to be entitled to compensation for the deficiency; but that, as the purchaser had been furnished with a valuation of the woods, the value of which was the same whether it was spread over a greater or less number of acres, the compensation should only extend to the value of the land as distinct from the wood. *Hill* v. *Buckley*, 17 Ves. 394. But, where the estate was stated in general terms to contain, *by estimation*, forty-one acres, *were the same more or less*, and the quantity was found, upon an admeasurement, to be less than thirty-six acres, the same learned Judge decided against the purchaser's claim to compensation for the deficiency. His Honour said, that the effect of the words "more or less" added to the statement of quantity, had never been yet absolutely fixed by decision, being considered sometimes as extending only to cover a small difference the one way or the other; sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it. In this instance, the description was rendered still more loose by the addition of the words "by estimation." The estimated extent of ground frequently proves quite different from its contents by actual admeasurement. It could not be contended that the terms "estimated" and "measured" have the same meaning. If a man were told that a piece of land was never measured, but was estimated to contain forty-one acres, would that representation be falsified by shewing that, when measured, it did not contain the specified number of acres? The only contradiction to that proposition would be, that it had not been estimated to contain so much. *Winch* v. *Winchester*, 1 Ves. & Bea. 375.

Purchaser entitled to compensation for deficiency of quantity.

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Words "more or less" how construed.

This case is not to be deemed an authority for holding any considerable variation of quantity to be covered by the words "more or less," which are, for the most part, words of course; and it may be observed, that

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portions of the freehold and copyhold lands, or any other error shall appear in the particulars, such mistake or error

these, or other such expressions, are, in general, neutralized by, as being inconsistent with, a minute specification of quantity, or at least they refer only to the smallest particulars of such stated quantity. Thus, if lands are described to be *about* a given number of acres, roods, and perches, the uncertainty implied by the word "about" can only extend to the perches, or, at most, to the roods and perches, for the enumeration of these supposes the number of acres to be ascertained.

"*About*" a certain quantity, how construed.

In a late case, where the agreement was to sell an estate, "containing the several quantities after mentioned, that is to say, by the plan drawn by Mr. F. in 1792," the agreement then stated the numbers and particular quantities of each close, concluding with "containing altogether *about* 101 acres, 3 roods, and 29 perches," there was a deficiency of two acres in two closes, which, together, were stated to contain 8 acres, 1 rood, and 4 perches:—It was held, that the purchaser was entitled to an abatement, as the quantity of each close was particularly specified. *Gell* v. *Watson*, Sugd. Vend. 8th ed. 298, 16 Nov. 1825.

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Whether a purchaser is bound to complete where the deficiency is great.

Though deficiency of quantity is in general a subject for compensation, and does not enable the purchaser to avoid the contract, yet it is probable that this rule would not be held to apply to a very large deficiency, and that even the usual condition, that errors of description shall not annul the sale, would not extend to such a deficiency as rendered the estate actually sold substantially different from the estate intended to be purchased.

In a late case, where the contract stated the lands to consist of 349 acres, or thereabouts, were the same more or less, and provided that the parties should not be answerable for any defect or deficiency in the quantity, but that the premises should be taken by the purchaser at the quantity, whether more or less; and it turned out that the actual number of statute acres was less by one hundred acres than the specified number, Lord *Eldon* said, he never could agree that such a clause would cover so large a deficiency in the number of acres as was alleged to exist here. *Portman* v. *Mill*, 2 Russ. 570.

The relief, in such a case, must proceed upon the principle that the parties, having stated a quantity, could not intend that the statement should be wholly disregarded; (for if such were the intention, why state a quantity at all?) or that the vendor could not possibly have been ignorant of its being greatly erroneous; for it may be observed of these, and all other clauses intended to guard against mistake, that they are not to be perverted to the purposes of fraud; and, therefore, if a vendor could be proved to have known, at the time, the quantity to be less than that which is stated, no such clauses would protect him from the consequence

shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require; such com- CONDITIONS OF SALE OF FREEHOLD AND COPYHOLD.

of the misrepresentation. See 1 Ves. & Bea. 377. And for the same reason, a purchaser, knowing the actual quantity, could not avail himself of an error of statement as a ground for compensation; but proof of such knowledge is not often in the power of the opposite party. If equity would not enforce a contract against a purchaser where the deficiency is very large, *a fortiori*, would it not do so where there is a large excess, assuming, of course, that he is required to pay a rateable increase of price for such excess. (See an observation as to such clauses, *ante*, p. 401).

In connection with the present subject, some notice should be taken of the late statute for regulating weights and measures.

As to statute and customary acres.

The reader scarcely needs to be informed, that, by local custom, an acre sometimes consists of more, but oftener of less than the statutable acre, which was fixed by the act of 33 Edw. I. at one hundred and sixty square perches; and disputes frequently arose as to whether the customary or the statute measure was to prevail.

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Stat. 5 Geo. 4, c. 74, establishing uniformity of weights and measures.

This question seems now to be excluded by the late stat. of 5 Geo. 4, c. 74, intituled "An act for ascertaining and establishing uniformity of weights and measures," which, after providing that the distance between two points, in a certain straight brass rod, in the custody of the clerk of the House of Commons, shall be the imperial standard yard, enacts—"That all superficial measure shall be computed and ascertained by the said standard yard, or by certain parts, multiples, or proportions thereof; and that the rood of land shall contain 1,210 square yards, according to the said standard yard; and that the acre of land shall contain 4,840 such square yards, being 160 square perches, poles, or rods. Sect. 15 provides, that from and after the first day of May, 1825, (which is postponed by stat. 6 Geo. 4, c. 12, to 1st January, 1826), all contracts, bargains, sales, and dealings, which shall be made or had within any part of the united kingdom of Great Britain and Ireland, for any goods, wares, merchandise, *or other thing*, to be sold, delivered, done or agreed for by measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be made and had according to the standard measures ascertained by this act; and in all cases where any special agreement shall be made with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures, shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void." The act then repeals numerous antecedent statutes. It is singular, as the regulation of the measure of *land* was evidently one of the objects of the statute, (for to land alone could the clauses respect-

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pensation or equivalent to be settled by two referees, or their umpire. Each party, within ten days after the discovery of the error, and notice thereof given to the other party, shall appoint one referee, by writing; and in case either party shall neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone may make a final decision. If two referees are appointed, they are to nominate an umpire before they enter upon business, and the decision of such referees or umpire, as the case may be, shall be final.

Lastly. That if any purchaser shall neglect or refuse to comply with any of the above conditions, his or her deposit-money shall be considered as forfeited, and retained by the vendor as ascertained and liquidated damages for such default; who, upon such default, shall be at liberty *to re-sell [*428] the estate, either by public auction or private contract, without the necessity of previously tendering a conveyance or surrender to the defaulter; and the deficiency, if any, arising on such second sale, together with all expenses attending such re-sale, shall be made good by the defaulter at the present sale (*n*).

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ing the acre and perch apply), that land was not specified in the clause respecting agreements. The expression, "other thing," however, would no doubt be held to comprehend it.

As to the time allowed for the performance of the contract.

(*n*) At law, a contract must be strictly performed. If, therefore, a vendor do not deliver the abstract of title, or complete his title, and execute a conveyance at the time fixed by the contract, the purchaser may immediately maintain an action for the recovery of the deposit. *Wilde* v. *Fort*, 4 Taunt. 334. Such actions, however, are usually stopped in equity, where the rule is different; it being considered inequitable, that either party should lose the benefit of the contract because he was not prepared to complete it with punctual exactness on the appointed day; and that the substantial justice of the case is attained by giving to the party who ought to have been paid his purchase-money interest thereon, and to the party who ought to have had the estate, the rents of it; and so far was this doctrine carried at one period, that Lord *Hardwicke* is said to have decreed the specific performance of an agreement against a purchaser, without any regard had to the plaintiff's negligence in not producing his deeds, &c. *Gibson* v. *Paterson*, 1 Atk. 12; but the case appears to have been mis-reported, see 4 Ves. 690, n.; and "whatever opinion Lord *Hardwicke* entertained upon

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this subject, it is now settled, that a man cannot call upon a Court of equity for a specific performance, unless he has shewn himself ready, desirous, prompt, and eager." See *Spurrier* v. *Hancock*, 4 Ves. 667; Sugd. Vend. 8th ed. 364.

Time may be made the essence of the contract.

For a long time, too, it was considered that equity would not admit of a stipulation making time the essence of the contract. Lord *Eldon* found this to be the doctrine when he entered the Court, (see 1 Jac. & Walk. 420); but his Lordship successfully combated it (see 7 Ves. 265); and the rule is now well established, that, even in equity, time may be made the essence of the contract; *Levi* v. *Lindo*, 3 Mer. 81; *Withy* v. *Cottle*, 1 Turn. 79; and where it appears, by the express terms of the contract, or may be inferred from the nature of the subject matter of it, that such was the intention of the parties, the Court will refuse its aid to either party, who has not performed, or been prepared to perform it on the day. This exception to the general doctrine applies to the sale of a manufactory or commercial establishment; *Wright* v. *Howard*, 1 Sim. & Stu. 190; or the good-will of a public-house; *Coslake* v. *Till*, 1 Russ. 380; in which the purchaser's object would generally be defeated by delay: and also of property which is exposed to daily fluctuations of value, as a transferable government security, *Dobret* v. *Rothschild*, 1 Sim. & Stu. 590; or the value of which is *daily diminishing, and which is liable to immediate determination upon [*429] a contingency, as a life annuity. *Withy* v. *Cottle*, 1 Turn. 79†. In such cases it is obvious, that adequate compensation cannot be given by the application of the ordinary rule upon which the Court acts; and the *laches* of the vendor, therefore, discharges the purchaser. But the mere allegation by the purchaser, that he wanted the estate for a place of residence, has been held not to be sufficient to make the time stipulated for the delivery of possession essential. *Boehm* v. *Wood*, 1 Jac. & Walk. 419.

In all the preceding cases, the complaint of delay proceeds from the purchaser. The case of the sale of a reversion, however, presents a contrary case, (being the exact converse of an annuity). Such a sale is usually made under the pressure of embarrassment, for the purpose of obtaining immediate pecuniary aid; and the contract, therefore, could not be enforced by a purchaser, who was not ready with his money on the day. *Newman* v. *Rodgers*, 4 B.C.C. 391. How far a *purchaser* could avail himself of the *vendor's* want of punctuality in such a case, in a suit by the vendor, or, in other words, whether a party could resist the performance of a contract, on the ground that the opposite party might, *for reasons applicable exclusively to him*, have resisted it, is an important, and perhaps a doubtful question. Generally speaking, the right must be mutual; upon

† In this case, however, the point was not disposed of.

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which ground it has been lately held, that the specific performance of a contract for purchase cannot be compelled *by*, because incapable of being enforced *against*, an infant. *Flight* v. *Bolland*, 4 Russ. 298.

The benefit of a clause making time the essence of the contract, may be waived in equity by the conduct of the parties, *Hudson* v. *Bartram*, 3 Madd. 440, as the right to a strict performance may be clearly waived at law. And where one party promises that he will do to-morrow what ought to be done to-day, the other hearing this without objection will be considered to acquiesce. *Carpenter* v. *Blandford*, 3 Man. & Ryl. 93; *S. C.* 8 Barn. & Cres. 575.

Whether a party can, by subsequent notice, render time essential.

It should seem, that where time is not made essential by the terms of the contract, it is not competent to either of the parties, by any subsequent notice or intimation, to render it so; at all events, such notice must be unequivocal, and should be accompanied by those acts which, on the part of the person giving the notice, indicate the abandonment of the contract. Thus, in the case of *Reynolds* v. *Nelson*, 6 Madd. 18, where the contract was to be completed on the 25th December, and the vendor (who had received a deposit) on the 22nd of that month served a notice on the purchaser, intimating that he should attend at a certain place and hour on the 24th and 26th of December, to execute an assignment; adding, that if the purchaser made default, he (the vendor) should consider him *as refusing to perform his agreement and act accordingly*. The vendor attended according to the notice; the purchaser did not attend; but, in the April following, returned the abstract of title, with some objections, and, about the same time, filed his bill for specific performance.

[430] Sir *J. Leach*, V. C.—"It may now be considered as the settled doctrine of the Court, that, by the terms of the agreement, time may be made of the essence of the contract. It has not, however, been decided, that, where there is no special stipulation in the contract, time may be made essential, by subsequent notice that it will be so considered; and, in this case, I may leave that point untouched. The notice given in this case was not, that the defendant would consider the contract at an end if it were not completed within the time, but that he would consider its not being completed within the time as equivalent to a refusal to perform it, and would act accordingly; but whether he would act as if the contract were abandoned, or would act by filing a bill for a specific performance, he leaves wholly in doubt; and it is to be observed, that he neither returned nor tendered the deposit which he had received. There must, therefore, in this case, be the usual reference as to the title."

A declaration, that time shall be the essence of the contract is more frequently introduced at the instance of the buyer than of the seller, as the latter generally relies upon the condition in the text, entitling him to resell the estate and claim the deficiency from the purchaser. But this con-

dition alone would not preclude the purchaser's right to a specific performance on account of a slight delay; and, therefore, if it is very important to the vendor that the contract should be completed within the prescribed period, a stipulation to the following effect should be inserted:—

Condition making time the essence of the contract.

"That if the purchaser, or respective purchasers, shall not, on or before the —— day of —— next, state their objections, if any, to the title of the vendor, and shall not, on or before the —— day of —— next, send to the vendor's solicitors for their perusal the draft of his or their conveyance, and shall not, on or before the —— day of —— next, pay the amount of his, her, or their purchase-money, then this contract shall be absolutely null and void to all intents and purposes whatsoever, and shall not be capable of being enforced by the purchaser in any Court of equity, it being the intention of the said parties hereto, that time shall be deemed to be of the essence of the contract, any rule in equity to the contrary notwithstanding: Provided, nevertheless, that this present clause shall not preclude or prejudice the vendor's right to enforce the performance of the contract, if he shall think fit."

This condition in effect gives the vendor the right to rescind the contract. Perhaps it would be more simple to give him this right *totidem verbis*.

CONDITIONS OF SALE BY ASSIGNEES OF BANKRUPT.

CONDITIONS *on a* SALE *by the* ASSIGNEES *of a* BANKRUPT, *who* STIPULATE *that the* PURCHASER *shall take the* BANKRUPT'S TITLE (*a*).

THAT the highest bidder shall be the purchaser, and if any dispute shall arise between two or more bidders, the premises (*b*) shall be put up again at the last bidding.

II. That no person shall advance less than £—— at any bidding, or retract his or her bidding.

III. That the (*c*) purchaser shall pay to the auctioneer (*d*),

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As to titles to be made by assignees in bankruptcy.

(*a*) It is now settled, that assignees in bankruptcy are under the same obligation to deduce a good title as other vendors. *M'Donald* v. *Hanson*, 12 Ves. 277; see also 18 Ves. 512; *Wilde* v. *Fort*, 4 Taunt. 334. If, therefore, the bankrupt's title be defective, the assignees should enter into special stipulations adapted to the nature of the defect, of which numerous specimens are given in the accompanying precedents; or, if the case requires it, should protect themselves under the general and very potent clause contained in the present form. But if assignees plainly neglect their duty to the creditors in the contract they enter into, such contract cannot be enforced by the purchaser. See *Turner* v. *Harvey*, Jacob, 178.

(*b*) If there be more than one lot, instead of "the premises," say—"the lot in dispute."

(*c*) If there be more than one lot, say—"each purchaser."

Bankrupts' estates exempt from auction duty.

(*d*) Bankrupts' estates are exempted from auction duty. The question has been much agitated, whether this exemption extends to estates *in mortgage*. The case of *Coare* v. *Creed*, 2 Espin. 699, decided, that it did not, on the ground that the act of 19 Geo. 3, c. 56, s. 15, which was then in force, applied the exemption only to estates sold "by the order of the assignees." This was followed by the case of *King* v. *Abbott*, 3 Price, 178, where the point received a similar determination. Since these cases, the late bankrupt act, 6 Geo. 4, c. 16, s. 98, has declared that "all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any auction duty." As this enactment is general, and not con-

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immediately after the sale, a deposit at the rate of 10*l. per cent.* on the amount of his or her purchase-money, and sign an agreement for the payment of the remainder to the vendors on the —— day of ——, when the purchase is to be completed; from which time the purchaser is to be entitled to the rents and profits(*e*) of the estate.

IV. That upon payment of the remainder of the purchase-money at the time aforesaid, the purchaser shall have a conveyance of the bankrupt's interest in the premises, to be prepared by and at the expense of the purchaser; but the vendors shall not be obliged to produce any documentary or other evidence of title whatsoever, *other than and except the [*433] usual bargain and sale enrolled from the commissioners under

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fined to estates sold by the order *of the assignees*, the decisions before the statute seemed not to apply; and, accordingly, in a late case, it was held by the Court of Exchequer, without impugning the authority of those decisions, that mortgaged estates are not now subject to the duty. *Rex* v. *Winstanley*, 2 You. & Jerv. 124. The sale had been made by the order of the assignees for the benefit of the mortgagees and the bankrupt's estate. The Lord Chief Baron (*Alexander*) rested his decision principally on the argument that the act was passed for the benefit of bankrupt's estates, and that, whether the mortgaged estate was greater or less in value than the amount of the money due upon it, the charge would eventually fall upon the bankrupt's estate; in the former case, by diminishing the assignees' surplus; and, in the latter case, by diminishing the fund for payment of the mortgagee; and thereby increasing the amount of the proveable claim against the estate. This decision was not acquiesced in by the advisers of the Crown, who brought a writ of error in the Exchequer Chamber, when the Judges, being divided in opinion, the judgment of the Court below was affirmed, in order that the question might be brought before the House of Lords, where the case is now pending. As the point had been the subject of controversy before the late bankrupt act, it is remarkable, that the framers of the act did not insert a few words affirming or negativing the exemption. Considered as a means of preventing litigation, this statute is certainly not one of the most successful efforts of modern legislation.

(*e*) If the premises are in hand, say—

"possession."

A bankrupt in possession of property which has been sold by his assignees, will be ordered to deliver it up, though a petition to supersede the commission be pending. *Ex parte Hargraves*, 2 Glynn & Jam. 59.

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the said bankruptcy; And also except certain indentures of lease and release of the —— and —— days of ——, by which the estate now offered for sale was conveyed unto and to the use of the bankrupt, his heirs and assigns, for ever, and an abstract of which shall be delivered within —— days after the sale; and if the purchaser shall require the commission of bankruptcy, or any part of the depositions or proceedings under the commission to be entered of record, the same shall be done by and at the expense of the purchaser (*f*).

V. That if the completion of the purchase should be delayed from any cause whatsoever beyond the said —— day of ——, the purchaser shall pay interest at the rate of *5l. per cent. per annum* on the residue of his or her purchase-money from that day until the time of payment.

(Add other conditions, as in former precedents.)

(*f*) As to the purchaser's right to require the enrolment of the proceedings, *vide ante*, p. 378.

CONDITIONS OF SALE UNDER DECREE IN CHANCERY.

CONDITIONS *for the* SALE *of an* ESTATE SOLD *in Lots under a* DECREE *in the* COURT *of* CHANCERY, *with various special* STIPULATIONS *as to* TITLE (*a*).

THAT each lot shall be put up at the sum fixed by the auctioneer, and no bidding shall be made at an advance of less than £—— on the last preceding bidding.

II. One bidding will be reserved for each lot according to the order of the Court of Chancery (*b*).

(*a*) Of course, it could scarcely ever happen that so many special stipulations respecting title as are inserted in this or the following precedent, would be requisite in any one case. The Editor's aim has been to supply conditions adapted to most of the questions which ordinarily occur; and it seemed desirable to distribute them into as few precedents as possible.

(*b*) The particular refers to the fact of the sale being by order of the

CONDITIONS OF SALE UNDER DECREE IN CHANCERY.

III. That the purchaser of each lot shall pay the amount of his or her purchase-money into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, in trust, in the cause of [*plaintiff*] *v.* [*defendant*], together with the amount of the valuation of the timber and trees thereon, on or before the —— day of —— next; and on payment of which, the respective purchasers shall be entitled to the rents and profits from the said —— day of ——, up to which time all outgoings shall be cleared by the vendor (*c*).

IV. That if, from any circumstance, the purchase-money of any lot or lots shall not be paid on or before the said —— day of ——, the purchaser or purchasers shall pay interest thereon respectively at the rate of 4*l. per cent.* from that day until the time of payment (*d*).

V. That the purchasers of Lots — and — shall take to and pay to [*tenant*], the tenant of the same lots, at the time of taking possession of each lot respectively, for all manure, dressings, and half-dressings, seeds, straw, and other things on each lot, according to the custom of the country, as usual between incoming and outgoing tenant; the amount of which shall be settled by two persons, one to be appointed by the said [*tenant*] and the other by the purchaser; and, in case of their disagreement, by an umpire to be chosen by them, whose decision shall be final.

VI. That the vendor shall deduce a good title to the respective lots, subject to the qualifications herein contained.

VII. That, inasmuch as the fee-farm rent of 4*l.*, issuing out of Lot ——, forms part of a rent of 36*l.*, which, in *the year 1770, was granted out of a larger piece of ground, and [*435]

Court, and names the cause, place of sale, &c. The usual condition as to the payment of auction duty, it will be observed, is not inserted, sales by order of Court being exempt from such duty.

(*c*) The general rule in the case of sales by order of Court is, that the purchaser is entitled to the rents and profits from the quarter day preceding the payment of the purchase-money into Court. See *Anson* v. *Towgood*, 1 Jac. & Walk. 639.

(*d*) Interest is not payable for the timber, because, if the completion of the purchase be delayed, its advanced growth at the time of valuation is an equivalent. See Sugd. Vend. 508.

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the remainder of such rent of £——, is amply secured by the residue of the ground charged therewith, the purchaser shall not require evidence of the apportionment of the original rent, or of the discharge of the said premises therefrom, or of its being sufficiently secured out of the other part charged, other than the production of the receipts for the said rent of 4*l.*, for the last twenty years (*d*).

VIII. That the purchaser shall not require evidence of the fact of a person, who died siesed in fee of the property comprised in Lot ——, in the year 18—, having left no widow, or of her being since dead, as the vendor has endeavoured to obtain information on the subject without effect (*e*).

IX. That the purchaser shall not be entitled to require

As to property being sold subject to an apportioned part of a larger rent.

(*d*) This is a case often occurring in titles. In *Barnwell* v. *Harris*, 1 Taunt. 430, it appeared, that the messuage in question, with other houses, was built upon land demised, in 1764, at 28*l.* rent, and that the owner of the rent had, for more than twenty years, accepted 2*l.* a-year rent for these premises. The purchaser brought an action for his deposit on an objection to the title, founded on the liability of the premises to the larger rent. *Mansfield*, C. J., left it to the jury to consider, whether the rent had been apportioned by the act of the landlord; and they found for the plaintiff. The Court refused to disturb the verdict, being of opinion that the vendor was bound to adduce evidence of the apportionment, and could not oblige the purchaser to rely upon an apportionment being presumed from the payment for twenty years of the smaller rent; for, admitting such presumption to be clear, in the absence of all evidence, it might be rebutted by contrary evidence.

Inquiry to be made as to dower.

(*e*) Wherever a person, under whom the vendor derives his title, appears by the abstract of title to have been solely seised of the inheritance in possession, inquiry will of course be made as to the fact of his having been married at the time. Perhaps, proof of the negative of this cannot be required; and the purchaser ought, in order to entitle him to any evidence of the exemption of the estate from dower, to shew that the owner of the estate was married during his seisin, or at least to raise a presumption of this fact, by shewing that he had a wife at some anterior or subsequent period. When the fact to be ascertained is, whether a deceased person left a widow, his will should be looked into to see if mention is made of a wife; or, if he died intestate, it should be inquired to whom administration was granted. Sometimes the parochial register of burial states whether the deceased was a bachelor.

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further evidence of [A. B.] having been the son of [C.] and [D.] his wife, and of his having attained his majority on the —— day of ——, 18—, than the production of an extract from the register of baptisms belonging to the Society or Congregation of Dissenters, at —— street, in the city of ——, dated the —— day of ——, in which he is stated to be the child of the above-named persons, and to have been born on the —— day of ——, 18— (*f*).

Parochial baptismal register no evidence of time of birth.

(*f*) The statement in a register of christenings, of the child having been born on some anterior day, is no evidence of that being the period of its birth, as this is a fact not necessarily within the knowledge of the clergyman who makes the entry, but is communicated to him by others, and he is not required by law to notice it in the registry. The age, therefore, can only properly be computed from the time of baptism. *Wihen* v. *Law*, 3 Stark. 63.

As to dissenters' registers of baptisms, &c.

The baptismal and burial registers kept by dissenters, though frequently accepted in matters of title, as affording a reasonable presumption of the truth of the facts which they affirm, are not strictly evidence. Thus, in *Ex parte Taylor*, 1 Jac. & Walk. 483, an examined copy of an entry in the register of the births of dissenters' children, kept at Dr. Williams's library, in Redcross-street, was rejected as evidence of the age of a person petitioning for payment of a legacy under statute 36 Geo. 3, c. 52, s. 32. A register of baptisms in the island of Guernsey has also been held to be inadmissible to prove the age of a petitioner in Chancery. *Huet* v. *Le Mesurier*, 1 Cox, 275†.

Evidence of identity should accompany registers.

Where copies of registers are produced as evidence of title, they should be accompanied by affidavits of identity, especially if of a recent date, and the name be common. The baptism or burial of John Smith, or William Brown, in a populous parish, would be very imperfectly proved by a parochial register of the baptism or burial of a person of that name, without evidence of identity. It may be observed, that, where an estate has descended through the same channel as a peerage, it is not usual to require the ordinary evidence of heirship, because the facts must have been proved previously to the heir taking his seat as a peer in the House of Lords.

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† See some observations of Lord *Eldon* on the admission of copies of parochial registers as evidence. *Walker* v. *Wingfield*, 18 Ves. 443. An entry made by a clergyman of a christening, performed by his predecessor, is not evidence; nor is the memorandum of the parish clerk who was present. *Doe* v. *Bray*, 8 Barn. & Cress. 813; 3 M. & R. 428, *S. C.* The keeping of parochial registers is regulated by statute 52 Geo. 3, c. 146; see also 4 Geo. 4, c. 76.

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X. That, inasmuch as the counsel of the vendor is of opinion, that an estate in fee-simple in Lot —, which was conveyed to trustees in the year ——, may be presumed to have been reconveyed, the vendor shall not require a reconveyance of such estate (*g*).

XI. That, as the lands comprised in Lot — are covered by a modus of 2*d.* in lieu of each ton of hay, the vendor shall not be obliged to produce any other evidence in support of such modus than receipts shewing the uninterrupted payment thereof for the period of —— years; and the purchaser shall be precluded from making any objection whatever to the validity of such modus (*h*).

XII. That as Lot — contains some small slips of land lying between the antient boundaries of the —— estate and the turnpike road, and which have been inclosed several years, the purchasers shall be satisfied with the possession of such slips of land, and shall not require any title thereto (*i*).

As to presumptions of re-conveyance, &c.

(*g*) See a full note on such presumptions, *ante*, Vol. 6, p. 457.

(*h*) The difficulty of establishing a modus is such, that a vendor will generally do well to shelter himself under a condition of this kind. As to the essential qualities of a modus, see 2 Eagle on Tithes, 71.

Waste lands by the road side belong to the owners of the adjoining lands.

(*i*) It is a presumption of law, that the small pieces of waste, or uninclosed land, frequently found by the road side, belong to the owner of the inclosed lands next adjoining. Thus, in a case at *Nisi Prius*, where the question raised in an action of trespass was, whether a small piece of land adjoining the high road leading from Hampstead to London, which had been inclosed by the plaintiff, who claimed under the lady of the manor of Hampstead, belonged to him, or to the dean and chapter of Westminster, the owners of the adjoining freehold lands, Lord *Tenterden*, in the course of his address to the jury, observed—"In some of the more antient books of law, a difference of opinion appears to have existed as to the right to the waste lands adjoining to public highways; but, as far as my own experience goes, and I have heard the opinion of many learned judges upon the subject, it has uniformly been laid down, that land under such circumstances is presumed, in the first instance, to belong to the owner of the adjoining land; and not to the lord of the manor; but a presumption prevails only so long as proof to the contrary is wanting; and the question is, whether the plaintiff has, in the present instance, rebutted this presumption to your satisfaction. In remote and antient times, when roads were

XIII. That the vendor shall not be bound to adduce evidence of any fact which is stated or assigned as the ground

CONDITIONS OF SALE UNDER DECREE IN CHANCERY.

frequently made through uninclosed lands, and when the same labour and expense was not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law, that the public, where the road was out of repair, might pass along the road by the side of the road. This right on the part of the public was attended with this consequence, that, although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the *onus* of repairing the road. If the same person were the owner of the land on both sides, and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and where there was an antient inclosure on one side, and the owner of lands inclosed on the other, he was bound to repair the whole. Hence it followed as a natural consequence, that when a person inclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road to be used by the public, when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of wastes left at the sides of roads; the object was to leave a sufficiency of land for passage by the side of a road, when it was out of repair, is the general presumption of law; but this presumption is capable of being rebutted; and here the plaintiff undertakes to rebut it: he says that Lady Wilson is lady of the manor of Hampstead, and that she, as lady of the manor, is empowered by immemorial custom within the manor, to grant out waste lands with the consent of the copyholders of the manor. This cannot be done without a special immemorial custom to warrant it, since a copyhold tenure cannot have been created within time of memory." His Lordship then commented on the evidence supplied by the different grants of waste under the manor of Hampstead, observing that, out of the ten grants which had been proved, some of which were of pieces of land between the road and copyhold land, and others (three in number) of parcels of land between the road and freehold lands, the latter were the only ones which were material for consideration, since, as to the wastes between the road and the copyhold lands of the manor of Hampstead, no doubt could arise as to the right, and it was only in respect of the parcels between the road and the freehold lands that the presumption applied. The jury found a verdict for the defendant; and, it should seem, on the ground that sufficient evidence had not been adduced to rebut the presumption in question. *Steel* v. *Prichett*, 2 Stark. 463.

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or reason for any of the stipulations contained in these conditions (*k*).

Rule applies where the adjoining land is freehold.

And this presumption exists as well where the adjoining lands are copyhold, as where they are freehold. Thus, where an ejectment was brought to recover a cottage, which had been built on a slip of waste land adjoining to the close of one of the lessors of the plaintiff, which was copyhold, the jury gave a verdict for the plaintiff, and the Court discharged a rule *nisi*, for entering a nonsuit, being of opinion that the rule applied though the adjoining lands were of copyhold tenure. Mr. Justice *Bayley* said, "It is a *primâ facie* presumption, that waste land on the sides, and the soil to the middle, of a highway, belong to the owner of the adjoining freehold land. The rule is founded on a supposition, that the proprietor of the adjoining land, at some former period, gave up to the public, for passage, all the land between his inclosure and the middle of the road. I think that rule applies not only to freehold, but to copyhold lands also. There was no evidence to shew when the road was first made, but it was a turnpike road. If the road existed at the time when the copyhold was first granted, *viz.* from time immemorial, the right of property in the road, and the waste adjoining, might in that case have remained in the lord. But if the road were taken out of the land after the copyhold was granted, then the presumption would be, that the property in the road, and the waste adjoining, was in the copyholder. Now, I think that we ought not to presume that the road in question was made before the time of legal memory. The probability is, that it was made long since. And if the road was made within the time of legal memory, then the *primâ facie* presumption is, that the waste land adjoining the road belonged to Roberts, the copyhold tenant of the land next adjoining, and not to the lord. The rule for entering a nonsuit must, therefore, be discharged." *Doe* d. *Pring* v. *Pearsey*, 7 Barn. & Cress. 304. The presumption in question, however, does not obtain where the slips of land adjoining the road are contiguous to, or communicate with, open commons, or other larger tracts of land; for, in such case, it is rather to be inferred that the ownership of the larger piece of land applies also to the slip. *Grose* v. *West*, 7 Taunt. 39. And evidence of acts of ownership exercised by the lord of the manor over other slips of land similarly situated within the manor is admissible in support of his claim. *Doe* d. *Barrett* v. *Kemp*, 5 Moore & Pay. 173.

As to the necessity of proving an alleged fact in certain cases.

(*k*) Where a person alleges a fact as a ground or reason for any stipulation which he imposes on another with whom he is contracting, it is by no means clear that he may not be called upon by the latter party to prove the fact so alleged. The application of this rule to the present con-

XIV. That the purchasers shall be entitled to the custody of such deeds (if any) as may relate exclusively to *the lots purchased by them respectively, but such title-deeds as relate to any other lot, shall remain in the Master's office until the whole of the lots shall have been disposed of, with liberty to the purchasers at the present sale to inspect such deeds from time to time, as occasion may require; and when a sale of the whole of the other lots shall have been effected, the said deeds shall be delivered to the purchaser of the largest lot, on his entering *into a deed of covenant with the other purchasers for the production thereof, and for furnishing copies or extracts, such deeds of covenant to be prepared at the expense of the covenantees respectively; and the purchasers at this sale shall not be at liberty to object to the transfer of the purchase-monies out of Court, by reason of the deeds being to remain in the Master's office.

CONDITIONS OF SALE UNDER DECREE IN CHANCERY.

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ditions of sale, it is obvious, would throw upon the vendor the necessity of adducing proof of many circumstances which it would be difficult and inconvenient to establish, and greatly defeat the object of the stipulations in question; which, therefore, ought to be accompanied by the present condition, or else they ought simply to provide that the specified things shall not be required without assigning any cause or reason for it.

CONDITIONS *of* SALE *of a* CONSIDERABLE ESTATE *sold in the Country, by* DEVISEES IN TRUST (*a*), *in* NUMEROUS LOTS, *some of which were very small, with various* QUALIFICATIONS *and* RESTRICTIONS *as to* TITLE, *&c.*

CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

THAT the respective lots shall be put up at such prices as shall be announced by the auctioneer.

(*a*) Where the vendors sell as trustees, it is proper to state the fact in the particulars or conditions of sale, in cases at least in which the purchaser cannot have covenants for title; as, where the property is sold for the payment of debts, or for the benefit of infants, &c. Sir E. Sugden, in several of the editions of his Treatise on Vendors and Purchasers, expressed a

Whether want of covenants for title discharges a purchaser from his contract.

CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

II. That the highest bidder for each lot shall be the purchaser, and if any dispute shall arise as to the last or highest bidding for any lot, the lot with respect to which such dispute shall arise shall be put up again at the last preceding bidding.

III. That no person shall advance less than 20*l.* at any bidding, on Lots —, —; 10*l.* on Lots —, —; 5*l.* on Lots —, —, —; and 2*l.* on each of the other lots; or retract his or her bidding.

IV. That the respective purchasers shall immediately pay down a deposit, in the proportion of 10*l.* for every 100*l.* of his or her purchase-money, when it shall amount to 200*l.* and upwards, and 20*l.* for every 100*l.*, when it shall amount to a less sum, into the hands of [*vendor's solicitor*] (the solicitor of the vendors), and sign an agreement for payment of the remainder on the —— day of —— next, between the hours of 10 and 11 of the clock in the forenoon, at the

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doubt whether specific performance could be enforced against a purchaser from whom the information in question had been withheld. Sugd. Vend. & Purch. 6th ed. 455. But, in the last edition, this eminent writer has suppressed the passage, whether on account of a change in his opinion on the point does not appear. If it be decided that the want of covenants for title on the occasion of his own purchase discharges a purchaser, the question would arise, whether the same consequence does not ensue from a similar deficiency in any antecedent conveyance; for it seems difficult to distinguish the two cases, and to extend the doctrine to the latter would invalidate ninety-nine out of every one hundred titles in the kingdom. Indeed, it might happen, if any such rule were established, that a contract, originally binding, might become, from subsequent circumstances, incapable of being enforced against a purchaser; as, where a man, after contracting for the sale of an estate, dies, having disposed of his real and personal estate in such a manner as to devolve to different persons, the latter (which would include the produce of the sale) to minors, who are necessarily incapable of covenanting for the title, which the heir or devisee, of course, having no beneficial interest in the property which he conveys, would not be compellable, and could not be expected voluntarily, to do. If the purchaser is entitled to insist on covenants at all, of course he may require that they should proceed from the beneficial owners themselves; and he would not be bound to accept the covenants of a stranger, or, it is conceived, those of one *cestui que trust* in regard to the share of another who is incapacitated by infancy or otherwise from joining.

offices of the said [*vendor's solicitor*], situate in ——; at which time and place the purchases are to be completed, and the respective purchasers are from thenceforth *to be entitled to the rents and profits of the said premises; and all outgoings to that time to be cleared by the vendors; but if the completion of the purchases shall be delayed by any cause whatever, beyond the said —— day of ——, the purchaser shall pay interest at the rate of 4½*l. per cent. per annum* from that day.

CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

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V. That the vendors shall, on or before the —— day of —— next, at the expense of the trust-estate of the late [*testator*], deceased, prepare a general abstract of their title to the manor of ——, and the farms and lands thereto belonging, which shall be left at the offices of the said [*vendor's solicitor*], for the inspection of the respective purchasers, or their counsel or solicitors; but the vendors shall not be obliged to deliver a copy of the whole abstract (the same being of considerable length), except to the purchasers of Lots —, —; and that the vendors shall deliver to the respective purchasers of the other lots, which comprise the manor of ——, and the lands thereto belonging, an abstract of their title for the last forty years; but, if any or either of the purchasers of such other lots shall require a copy of the whole abstract, the same shall be delivered to them or him on their or his application, and paying for the same, but not otherwise (*a*). And that the vendors shall, on or before the said —— day of —— next, at the expense of the said trust estate, deliver to the respective purchasers of the lots not held under the general title to the manor of ——, and lands thereto belonging, a complete abstract of their title thereto. And if the said respective purchasers, or their solicitors, shall not, within one calendar month after the delivery of the said respective abstracts, state to the said [*vendor's solicitor*] some valid objection to the title, they shall be considered as accepting the same; and all objections not delivered by that time shall be considered as waived.

VI. That the vendors shall not be called upon for, or re-

(*a*) Where the abstract of title is very long, and some of the lots small, a stipulation to this effect is often found to be useful.

CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

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quired to produce, any evidence or documents of title to the lands which have been taken in exchange, anterior to the deeds by which such exchanges have been effected; nor to deduce the title to the lands given in *exchange (*b*); nor shall any title be required to the allotments which have been set out or awarded for the said [*testator*], deceased, by the commissioners under the act of Parliament for inclosing lands in the said parish of ——, other than an extract from their award.

VII. That no evidence shall be called for or required by the respective purchasers to be produced, of the birth, marriage, death, intestacy, or heirship of any person or persons, or of any other fact material to the title, (either for the purpose of verifying the abstract or otherwise), where such fact shall have been stated, or taken notice of, or implied in any of the title-deeds bearing date upwards of thirty years ago; nor shall any purchaser require evidence of the payment or other discharge of any legacy or sum of money charged on any of the said premises, by any will or codicil, which became payable more than —— years since, nor of the payment of arrears of life-annuities which have ceased or expired more than six years (*c*). And inasmuch

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(*b*) As to this, *vide ante*, Vol. 4, p. 88.

Arrears of annuities should be shewn to be paid.

(*c*) It is not enough to prove that an annuity affecting the property is expired; evidence should be adduced of its having been duly paid up to the time of its expiration. The case of *Wynne* v. *Williams*, 5 Ves. 130, strongly shews the necessity of attention to this point. A testator devised his estates to A., charged with an annuity of 100*l.* to his (the testator's) wife. A. mortgaged the lands several times, and the widow joined in the mortgages for the purpose of postponing her annuity. A. afterwards sold the equity of redemption, and the purchaser took an assignment of the mortgages, but the widow did not join in the purchaser's conveyance. She died in 1781, and the present bill was filed in 1796, by her representatives, against the purchaser, to recover the arrears of the annuity, *from the death of the testator in* 1769, to that of the annuitant in 1781; and Sir *R. P. Arden*, M.R., decreed in favour of the plaintiff, on the ground, that the length of time did not warrant him in presuming satisfaction. The effect of this decree, therefore, was, to oblige a purchaser to pay twelve years' arrears of an annuity, which had ceased fifteen years before the filing of the bill. Here the annuitant was living at the time of the purchase;

as the manor of —— and other hereditaments were formerly subject to a yearly fee-farm rent of £——, which was purchased by the said [*testator*], and conveyed to him by indentures of lease and release, of the —— day *of ——, 18—, with a schedule of the deeds and writings of the anterior title, no purchaser shall require the vendors to produce any other evidence of the anterior title to the said rent than the said schedule. Nor shall the purchaser of Lot — be entitled to require evidence that the said [*testator*] who purchased the same as a reversionary interest, gave a full and adequate consideration for the same (*d*).

CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

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but, had she been then dead, (*i. e.*) had the sale taken place between 1781 and 1796, the result would have been the same.

As to proving the adequacy of the purchase-money on the purchase of reversions.

(*d*) From the peculiar doctrine applied in equity to the sale of a reversion, and which appears to throw upon a person purchasing property of this nature the obligation of proving the fairness of the transaction—a doctrine which has been much and justly reprehended—a condition of this kind seems advisable, where the transaction of the purchase has not become unimpeachable by the acquiescence of the parties in whom the right to disturb it resides. In the case of *Boswell* v. *Mendham*, 6 Madd. 373, lands had been settled upon A. for life, with remainder to his wife for life, with remainder to his eldest son in tail. Upon the son attaining twenty-one, a recovery was suffered by the father, mother, and son, and the lands were re-settled, subject to an annuity of 150*l.* to the son for life, to such uses as A. and his wife should appoint; and, in default of appointment, to the use of A. for life, with remainder to his wife for life, with remainder to A. in fee: the consideration moving from the father to the son was stated to be the present annuity, and a debt owing from the son to the father of 250*l.* A purchaser from A. required evidence of the existence of this debt, and the fairness of the transaction, and the Vice-Chancellor, Sir *J. Leach*, justified the requisition.

In some instances, the future interest is dependent on a contingency of such a nature as to be incapable of being the subject of estimate or calculation, as that of the prior tenant for life (who in the case cited was a bachelor) not leaving issue; and then, from the want of data, for ascertaining the true value, it is impossible efficiently to go into the inquiry as to the adequacy of the purchase-money; but where it appeared that the contract was originally made under the impression of the property sold being a vested reversionary interest, and, in the subsequent progress of the treaty, half the purchase-money was agreed to be deducted on account of the contingency, the Court directed this principle to be adopted in the inquiry before the Master. *Baker* v. *Bent*, 1 Russ. & Mylne, 224.

CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

VIII. That, upon payment of the remainder of the purchase-money at the time and place above mentioned, and the full observance and performance of these conditions of sale on the part of the respective purchasers, the vendors will execute conveyances to the said purchasers; but as the said vendors are only devisees in trust under the will of the said [*testator*], they shall not be required to enter into any other covenant than that they have done no act to incumber.

IX. That the purchasers shall not be entitled to require that the will of the said [*testator*] shall be proved *per testes*, or that the heir-at-law shall join in the conveyance in consequence of any informality in the memorandum of the attestation of the will, which is subscribed by three witnesses, who will make an affidavit that the same was subscribed by them in the testator's presence (*d*).

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X. That the deeds of conveyance, and any assignment

Where a purchaser from devisees is entitled to the concurrence of the heir-at-law, or to have the will proved *per testes*.

(*d*) If the memorandum of attestation does not state that the will was attested by the three witnessess in the testator's presence, though this statement is not essential to the validity of the will, yet it seems to be the better opinion, that the purchaser would be entitled to insist on the concurrence of the heir, or that the will should be proved *per testes*. In other cases, it should seem, a purchaser would not be justified in the requisition. And it is thought by some gentlemen, that, even where the attestation is informal, it cannot be supported, if an affidavit, such as that mentioned in the condition in the text, is produced. Covent. Convey. Evid. 97. Sometimes, an unproved will is in the hands of a third person. In such a case, the purchaser is entitled to have it proved in the Ecclesiastical Court, or deposited with one of the Masters of the Court of Chancery for safe custody; and the circumstance, that the heir-at-law has joined in the conveyance, does not negative this right; for it might happen that a devise had been made by the testator in favour of some other party; and, therefore, without seeing what the will contained, it would be impossible to say whether the vendors had a good title to the premises. *Coppard* v. *Harrison*, 2 Cox, 320. It does not appear in this case, that a covenant for the production of the will had been offered. If a purchaser were entitled to reject such a covenant, it could not be on the ground that the probate of it in the Ecclesiastical Court gives to the will additional value, as evidence of title relating to the real estate (which clearly it does not). Indeed, if the will relate to real estate only, that Court has no jurisdiction over it; but where it embraces personalty, as wills commonly do, it ought to be proved there; and hence it is that that Court is the general repository of wills, both of real and personal estate.

of outstanding terms already assigned to attend, or otherwise attendant on the inheritance, shall be prepared by and at the expense of the respective purchasers; and the same shall be executed, or tendered to be executed, and ready to be delivered, at the time and place above mentioned (*e*).

CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

XI. That the title-deeds, which relate generally to the manor of —— and lands thereto belonging, and also to any other lands included in the said particulars, shall, at the option of the vendors, either be retained by them or be delivered to the purchaser of such of the premises comprised in such deeds respectively as shall be sold for the most money; and that the person or persons so retaining or receiving the same shall enter into the usual covenants for the production, preservation, and giving copies thereof to the respective purchasers of the other lots comprised therein, and to the vendors, in case all the premises comprised therein respectively shall not be sold, and the vendors shall elect to deliver up the deeds; such covenants respectively to be prepared at the expense of the person or persons requiring the same; and all attested and other copies of title-deeds, wills, or of other documents relating to the said hereditaments, and all limited administrations to the effects of any deceased termor or termors, which shall be required *by any [*445] purchaser or purchasers, shall be made and taken out by the solicitor of the vendors, at the expense of such purchaser or purchasers.

(*e*) If an estate is subject to incumbrances, it should seem, that the purchaser is entitled to have them discharged by a separate deed, and is not obliged to make the incumbrancers parties to his conveyance; or, if he does, the vendor ought to pay for the increase thus occasioned to its length. This right, however, is not often insisted upon. If the purchasers are to be concluded from making any such requisition, a condition to the following effect may be inserted:—

Purchaser not bound to discharge incumbrances by his conveyance.

"That, if any lot or lots is or are subject to any mortgage or mortgages, or other incumbrances, the person or persons entitled to the benefit thereof shall concur in the conveyance to the purchaser or purchasers for the purpose of releasing or discharging the same; but the entire expense of such conveyance shall, nevertheless, be borne by the purchaser.

CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

XII. That the purchaser of each lot shall, immediately after the sale, pay to the auctioneer the auction duty; and also, for his trouble in selling the premises, the sum of £—— for Lots —, —, —; £—— for Lots —, —, —; and £—— for each of the other lots; and shall also pay the like sum to the solicitor of the vendors, for the contracts or agreements before mentioned, in addition to the stamp duty.

XIII. That if the purchasers of any or either of the said lots shall neglect or fail to comply with the above conditions, and to complete his, her, or their purchase or purchases, by the time and in manner aforesaid, the money by him, her, or them deposited by way of earnest, shall be actually forfeited to the vendors, who shall be at full liberty to re-sell the premises comprised in the lot or lots bought by such purchaser or purchasers respectively, either by public auction or private contract; and in such case, the deficiency (if any) occasioned by such second sale, together with all charges and expenses attending the same, shall, immediately after the same sale, be made good by the defaulter at the present sale; and in case of non-payment of the same, the whole thereof shall be recoverable by the vendors as and for liquidated damages; but any increase of price which the said premises may produce on such second sale shall belong to the vendors, who shall be at full liberty to do with the premises as they shall think fit.

XIV. That, if any error or mistake shall appear in the description of any of the lots, or in the nature or quantity of the vendor's interest therein, or any other error shall appear in respect thereof, such error or mistake shall not vacate or annul the sale; but a compensation shall be given or taken, as the case may require, which shall be ascertained and determined on behalf of both parties by [T. R.], of ——, land surveyor (*f*).

[446] XV. That, if it shall appear that a good title cannot be made to part of the lands comprised in any lot or lots, this shall not annul the sale in respect of such entire lot or lots, but the contract shall be carried into effect as to the residue

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Nomination of referee recommended.

(*f*) The nomination of an individual of known respectability, as the referee of questions of this nature, seems preferable to the ordinary plan of deferring the nomination until the occasion occurs.

CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

of the property comprised in such lot or lots, and a reduction *pro ratâ* made in the purchase-money, to be fixed by the said [R. T.]. And if such defect of title shall comprise an entire lot, the vendors shall be at liberty to rescind the contract, on returning to the purchaser the sum paid by him at the time of the execution of the contract, without any further claim on the part of the purchaser (*g*).

XVI. That if any or either of the tenants shall not quit and deliver up the possession of the premises in his, her, or their occupation on the —— day of —— next, the rent or rents payable by such tenant or tenants in respect of such premises so occupied by him, her, or them, shall from thenceforth, until such tenant or tenants shall quit, be apportioned between the respective purchasers, if more than one, of such premises; or if the whole shall not be sold, then between the purchaser or respective purchasers and the vendor, as the case may be, such apportionment to be made by the said [R. T.], and the tenant or tenants will give the requisite consent thereto (*h*).

Defect of title to one lot, no ground for resisting the performance of the contract as to others.

(*g*) The question has been much agitated, whether a purchaser of several lots can resist the performance of the contract as to one or more of such lots, on the ground, that a good title cannot be made to the others. Lord *Kenyon*, on several occasions, maintained the affirmative; *Poole* v. *Shergold*, 2 B. C. C. 118; 1 Cox, 273; 6 Ves. 676; *Chambers* v. *Griffiths*, 1 Esp. 149; and the same rule was adopted by the Court of Exchequer in another case; *Boyer* v. *Blackwell*, 3 Anst. 657; but this doctrine is now exploded: and it is clear, that a contract may be enforced against a purchaser in respect of any particular lot or lots, notwithstanding a defect in the title of any other lot or lots of which he may have been the purchaser, each lot being a distinct and independent purchase. *Drewe* v. *Hutton*, 6 Ves. 675; *Lewin* v. *Guest*, 1 Russ. 325. And even where the estate is sold in one lot, and a title cannot be made to a part, equity will compel the purchaser to take the rest at a proportionate price, if the part to which a title can be made is not essential to the enjoyment of the rest. *M'Farquhar* v. *M'Queen*, 11 Ves. 467; *Knatchbull* v. *Grueber*, 1 Madd. 153; *S. C.* 3 Mer. 154.

(*h*) Where an existing lease or tenancy extends to more than one lot, some arrangement as to the apportionment of the rent seems proper, to prevent disputes, as well between the respective purchasers, as between them and the tenant, who would not be bound by his lessor's apportion-

CONDITIONS ON COUNTRY SALE BY DEVISEES IN TRUST.

ment. *Vide ante*, Vol. 4, p. 352. And the tenant ought, therefore, to be a concurring party in the arrangement. If the property is held by lease, and the vendors have a counterpart, it should be stipulated in whose custody such counterpart is to be placed. *Vide ante*, p. 376.

As to conditions of sale of personal property.

THE foregoing precedents of conditions of sale embrace only sales of interests in real estate. Such conditions, in regard to sales of personal property, (using this term as exclusive of leaseholds), afford but little matter for comment.

Life and reversionary interests in stock, &c.

Life and reversionary interests in stock, or other trust funds, and also policies of life insurance, are frequently the subjects of sales by auction. Where the sale is of a life interest in stock in the public funds, and it is intended that the purchaser shall not have the dividends accruing between the date of the contract and its completion, an express stipulation to this effect should be inserted: otherwise the purchaser will be entitled to all dividends subsequent to the contract, this advantage being given him, in consideration of the precarious nature of the property, which may determine in five minutes after the contract is entered into. *Anson* v. *Towgood*, 1 Jacob & Walk. 639. In this case, the dividend accrued the day after the sale. The auctioneer had stated, that the purchaser would be entitled to the dividend; but Lord *Eldon* attached no weight to this fact, as the Court did not attend to such notice—"the mere babble of the auction-room, as it had been called."

In deducing the title to life and reversionary interests in trust-monies, an abstract of the deed, or will, creating the trusts, of course will be furnished; and which should set forth, not only the particular trust under which the vendor claims, but also the several clauses and provisions by which his interest is liable indirectly to be affected, as powers of advancing portions to children, varying investments, appointing new trustees, &c. If these powers are to be exercised with the consent of the person whose interest is the subject of the sale, it seems to be the better opinion, that, after he has parted with his interest, they cannot be exercised without the concurrence of the transferee. *Vide ante*, Vol. 5, p. 563. If the powers in question are, by the terms of the instrument creating them, exercisable without the vendor's concurrence, then the fact of the existence of such powers ought, in fairness, to be communicated to the purchaser; for which purpose an abstract of the deed might be produced at the sale, to which reference should be made in the conditions, as already suggested in regard to leases; *vide ante*, p. 405; and this may be a prudent precaution, even where there is ground to contend that the purchaser's concurrence would be requisite to the due exercise of the power. It is probable, however, that, if the purchaser has notice of the deed or will creating the trust, (as he necessarily has, if the conditions of sale refer to it), he would be bound by all the clauses contained in the deed; and therefore it is especially incumbent on *him*, to ascertain what those clauses are. See

Walker v. *Maunde*, 1 Jacob & Walker, 183. The purchaser would be entitled, at the vendor's expense, to an attested copy and covenant for the production of the deed creating the interest sold, and of any other instruments indirectly affecting the fund, as appointments of new trustees, &c., unless the contrary were provided by the conditions. Where the fund is standing in the names of executors, it may be sometimes proper to ascertain that a distinct appropriation, taking it out of the testator's general estate, has been made, and that the legacy duty has been paid. (As to such duty, *vide post*, Vol. 8, p. 370.

As to the title to life policies of insurance.

In making out titles to policies of life-insurance, there is more difficulty than is generally imagined. Not only is it necessary to the validity of the policy, that the age and state of health of the person whose life is assured should correspond with the representations made to the insurance office, but if the insurance is effected on the life, not of the assured himself, but of another person, it ought to be proved that the party effecting it had such an interest in the life at the time, and from thence, uninterruptedly, to the period of the sale, as is sufficient to validate the insurance; and these facts are so difficult, if not impossible, to be proved, that, if a purchaser is entitled to require such proof, the specific performance of a contract of this nature could scarcely ever be enforced against him. It has been decided, that the interest requisite to give validity to the insurance of another's life must be a pecuniary interest, so that a policy effected by a father on the life of his son cannot be supported on the mere strength of the parental relationship. *Halford* v. *Kymer*, 10 Barn. & Cress. 724.

Some of the insurance offices only require evidence of the existence of an interest at the time of effecting the insurance, while others dispense with proof of interest altogether. If the case were otherwise, an insurance on the life of another would be absolutely worthless, without a transfer of the debt or other property creating the interest. The want of power to enforce the demand, of course, renders the interest unmarketable for sale, though it is much less deteriorating in point of fact than formidable in sound, as formal or technical objections are rarely taken to fair claims by the respectable insurance offices. However, a considerable degree of risk is inseparable from property of this description; for, even if the present validity of the policy be well established, the maintenance of its validity is dependent on the continued observance of the conditions by the person whose life is insured—in not going abroad or entering into military service &c., and (where the policy is effected by the assured on his own life) is also liable to be defeated even in the hands of a transferree by his (the assured's) death by duelling, suicide, or the hands of justice; against all which the purchaser can have no other security that the covenant of the person in question, and sometimes he has not even that. It may be observed, that it has been decided by the House of Lords, (reversing the decision of the Court below, *Bolland* v. *Disney*, 3 Russ. 351), that an insurance on a person's own life is vacated

by execution for a capital offence, though the policy contains no provision expressly vacating it in such event, because the case is substantially the same as if the policy, in terms, assured the payment of the money in the event of the person, whose life is assured, suffering death for felony, which would be palpably bad. *Amicable Society* v. *Bolland*, 4 Bligh, New Series, 194.

APPOINTMENT AND RELEASE IN FEE.

APPOINTMENT *and* RELEASE *in Fee* (*a*) *by the* VENDOR *and his* TRUSTEE, *to the* PURCHASER *and his* TRUSTEE, *to* USES *to* PREVENT DOWER.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*vendor's trus-*

As to purchase-deeds in general.

(*a*) The title "Purchase Deeds" includes every species of assurance by which real or personal property is capable of being transferred, as grants, feoffments, bargains and sales enrolled, appointments, lease and release, demises, assignments, surrenders, agreements, &c. The peculiar properties of these various instruments have been pointed out in other parts of the present work; and the observations upon particular clauses will be found in the notes to the precedents containing them. Where freehold lands of inheritance belong to the vendor, subject to the usual uses to prevent dower, namely, to such uses as he shall appoint, and, in default of appointment, to the use of himself for life, with remainder to the use of a trustee during his (the vendor's) life, with remainder to the vendor in fee, the conveyance is usually made either by appointment or by lease and release, and more commonly by both these modes of conveyance, the appointment and release being contained in the same deed; and this expedient is adopted, not for the purpose of appropriating the advantages respectively belonging to both these assurances, (for that of course is impossible), but the release is added to the appointment, from abundant caution, to guard against the possible event of the appointment being inoperative from non-compliance with the requisition of the power, in regard to the mode of its execution or attestation. This reason, however, only applies where the power requires the appointment to be executed or attested in an unusual manner; which being now very seldom (it ought never to have been) done, the practice of adding a release to an appointment probably will fall into disuse. The scheme in question supposes the appointment to be the preferable mode of conveyance, since it makes it the primary, and the release

tee], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*], of &c., of the fourth

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the secondary or auxiliary, assurance only. But this is a point on which a few observations may be made.

Relative advantages of an appointment and lease and release.

The advantage of an appointment is, that the conveyance is effected by a single deed, no lease for a year being requisite, and the necessity of obtaining the concurrence of the vendor's dower-trustee is avoided; and to this must now be added the important consequence that the purchaser takes the estate exempt from judgments affecting the vendor. (*Vide Doe* v. *Jones*, stated *ante*, p. 383). Its disadvantages are, that the conveyance may possibly be void for non-compliance with the requisitions of the power, in regard to the execution or attestation of the instrument; and, it should seem, the vendor's covenants for title, &c., do not run with the land, so that no action could be sustained upon them by the purchaser's alienee. With respect to the danger of a defective execution, however, it is to be observed, that this can only arise when the power imposes some peculiar mode of execution or attestation, which, as already observed, is now usually avoided; and even if the instrument be inoperative as an appointment, it generally happens that there is an outstanding term, or a subsisting tenancy, so that the deed would take effect as a grant. The difficulty, however, in regard to the covenants for title not running with the land is not so easily disposed of. It arises out of the same principle as that on which the exemption from judgments is founded, namely, that the purchaser coming in under the deed creating the power, and not under the donee of the power, claims by a title independent of and paramount to the latter, and therefore cannot, for want of privity of estate, claim the benefit of covenants entered into with him. See Watk. Princ. Conv. by Morley, Coote, and Coventry, p. 53, n. Whether, for this reason, it is expedient to relinquish the advantages attending this short, convenient, and efficacious assurance, would depend upon circumstances. If, from the state of the title, the covenants are not likely to be wanted, or, from the condition of the parties, they would, when obtained, be of little value, probably a purchaser would be unwise to make much sacrifice in order to annex them to the land. If the contrary be the case, and more particularly if a covenant for the production of title-deeds be among the covenants, which would be rendered covenants in gross by conveying the property by means of an exercise of the power, it seems better to take the conveyance by lease and release. It has never been decided, whether the fact, that covenants for title do not run with the land, forms a sufficient ground for a purchaser's refusal to perform the contract. It is probable, that the objection would be considered untenable. It seems to depend considerably on a previous question already adverted to, (*ante*, p. 440), and which is also undecided, whether the ab-

Importance of making covenants for the production of title-deeds run with the land.

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part: WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of

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Recital of vendor's conveyance.

sence of covenants in any particular instance forms an objection to the title; for, if it does, then it seems to follow, that the difficulty, if not impossibility, of suing on the covenants, in consequence of the right of action not being vested in the owner for the time being of the land, also constitutes such an objection. It should seem, from Sir *J. Leach's* observation in the case of *Barclay* v. *Raine*, 1 Sim. & Stu. 451, that the circumstance of *a covenant for the production of deeds*, entered into with an anterior owner, not running with the land, would render a title unmarketable; since his Honour very broadly lays it down, that a purchaser is entitled to a covenant for the production of all the deeds not delivered to him; and a covenant on which he could sue only in the name of the covenantee or of his representatives, whom, after a considerable length of time, it might be impossible to find, and who, if found, would not be bound to allow their names to be used, could not be such a covenant as his Honour referred to. It must be remembered, however, that the learned judge has disclaimed the observation imputed to him in *Barclay* v. *Raine*, 1 Sim. & Stu. 449; thereby intimating an opinion, that, where an owner in fee enters into a covenant for the production of his title deeds with a person entitled to other parts of the lands to which the deeds relate, such covenant runs with the land. (*Vide ante*, p. 375). This is important, because it embraces the common arrangement, by which, when an estate is sold in lots, the title deeds are delivered to the largest purchaser, he covenanting with the other purchasers, or (as in *Barclay* v. *Raine*) with the vendor, for their production.

The preceding observations lead to this practical conclusion, that, when it is deemed to be of importance that the covenants respecting the land should run with the land, and especially when one of these covenants is a covenant for the production of title deeds, the conveyance from a vendor entitled under the ordinary uses to prevent dower, should be taken by way of lease and release, and not of appointment. And it may be also suggested, that, when the covenants in question are to be entered into by a person in whom the legal inheritance is not vested, it may sometimes be advisable to clothe him with the legal estate, for the mere purpose of imparting to his covenants the quality of running with the land, taking care, however, if the vendor be married, to avoid letting in dower.

As to the junction of the dower-trustee.

When a vendor, claiming under the common uses to prevent dower, conveys by lease and release, the dower-trustee ought, in strict technical propriety, to be joined; for, as the fee-simple is professed to be conveyed, all the estates composing that fee should be got in; but this is frequently not attended to, the trustee's estate being only a remainder for the life of the vendor, expectant on the determination by forfeiture of the vendor's

——, 18—, the release made between [A. B.], therein described, and [F.] his wife, of the first part; [C. D.], therein described, of the second part; the said [*vendor*], of the third part; and the said [*vendor's trustee*], of the fourth part; and by a fine *sur conuzance de droit come ceo, &c.*, levied by the said [A. B.] and [F.] his wife, pursuant to a covenant contained in the said indenture of release, all and singular the —— and hereditaments hereinafter described, and hereby appointed and released, or intended so to be, were conveyed and assured, *To such uses*, upon such trusts, and for such intents and purposes, as the said [*vendor*] should at any time, or from time to time, by any deed or deeds direct or appoint; And in default of such direction or appointment, *To the use* of the said [*vendor*] and his assigns, during his natural life, with a limitation to the said [*vendor's trustee*], his executors or administrators, during the life of the said [*vendor*], *Upon trust* for the said [*vendor*] and his assigns, with remainder *To the use* of the said [*vendor*], his heirs and assigns, for ever. AND WHEREAS the said [*purchaser*] hath contracted and agreed with the said [*vendor*] for the absolute purchase of the said —— and hereditaments hereinafter described, and hereby appointed and released, or intended so to be, for an estate of inheritance in fee-simple in possession, at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited contract, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*vendor*], at or before the execution of these presents, the receipt of which said sum the said [*vendor*] doth hereby acknowledge, and from the same sum and every part thereof doth release and for ever discharge the said [*purchaser*], his heirs, appointees, executors, administrators, and assigns (*b*), the said [*vendor*], by virtue and in exe-

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—of contract for purchase.

Testatum.

In consideration of £——, vendor appoints to the uses after declared.

previous estate for life; and therefore, if there is any difficulty in procuring the trustee's concurrence, and sometimes even where there is not, the estate is left outstanding.

(*b*) The payment of the purchase-money should always be acknowledged in the body of the deed, as well as by a memorandum indorsed, though in equity neither of these is conclusive of the fact, but the vendor, notwithstanding such acknowledgment, is at liberty to shew that the

Acknowledgment of receipt of purchase-money, how far conclusive.

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cution of the power or authority given or reserved to him by the hereinbefore recited indenture of release, and of all

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money was not paid. *Coppin* v. *Coppin*, 2 P. Williams, 291; see also *Hughes* v. *Kearney*, 1 Scho. & Lef. 132; *Grant* v. *Shallis*, 2 Ves. & Bea. 306. At law, however, it is otherwise; for *there* the rule being, that a statement in a deed cannot be contradicted by parol evidence, the vendor is estopped from averring the fact of non-payment, in opposition to the acknowledgment in the deed. *Rowntree* v. *Jacob*, 2 Taunt. 141. This doctrine was very distinctly recognised in the late case of *Baker* v. *Dewey*, 1 B. & C. 704, 3 D. & R. 99; where Baker, the plaintiff, proved the execution a deed, whereby, in consideration of 50*l.* paid to him by Dewey, the defendant, the receipt of which B. acknowledged in the usual manner, B. assigned certain leasehold premises to D. Parol evidence had been given that no money passed, but that it was agreed that D. should work out the consideration-money in his trade of a plumber and glazier. A subsequent deed was executed by Baker, assigning other property to Dewey, in consideration of 250*l.*, the receipt of which was acknowledged in the body of the deed; but, by a separate agreement in writing, *not under seal*, it was stipulated that Dewey should retain 60*l.*, part of the consideration-money, and work it out. In an action of *assumpsit* by Baker against Dewey, for not performing this work, it was contended, that evidence of the non-payment of the money was not admissible in either of these cases, as it went to contradict the deed. Mr. Justice *Bayley* said—"A party who executes a deed is estopped in a Court of law from saying that the facts stated in that deed are not truly stated. In this case, Baker has executed deeds, in which it is expressly stated, that the consideration for the purchase of the premises therein mentioned had been well and truly paid. He is precluded, therefore, from saying that any part of that money remains due as purchase-money. In point of fact, 50*l.*, which was the amount of the purchase-money in the first instance, and 60*l.*, part of the purchase-money in the second, were not paid. But it was stipulated that the defendant, who was a plumber and glazier, should do work in his trade, on account of the plaintiff, to that amount. The plaintiff is estopped by the deed from saying that the amount was not paid to him as purchase-money. He might be at liberty, however, to shew that, after the execution of the deed, part of the purchase-money was returned on the terms of doing certain work for the plaintiff." The learned judge then proceeded to shew, that the declaration contained no count applicable to such a case; and the Court therefore held, that the plaintiff must be nonsuited.

The receipt for the consideration-money, however, usually indorsed upon the deed, and signed by the vendor, not being under seal, works no

other powers and authorities enabling him in this behalf, *Doth* by these presents direct, limit, and appoint, that all

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estoppel; and therefore, if the deed itself does not, though the indorsed receipt does, distinctly state the payment of the consideration-money, a party is not concluded from proving the contrary. Thus, in *Lampon* v. *Corke*, 1 Dowl. & Ryl. 211; *S. C.* 5 Barn. & Ald. 606, a deed recited, that the defendant, being desirous of obtaining possession of certain premises, applied to, and prevailed on the plaintiff, to give him possession of the same; which the plaintiff accordingly did, *he, the defendant, having then agreed to pay unto the plaintiff the sum of* 40*l. for such possession;* and that the defendant had requested the plaintiff and A. to execute an assignment thereof; the deed then proceeded to state, that, in pursuance of such agreement, and "in consideration of the said sum of 40*l.* being now so paid to the plaintiff, *as hereinbefore is mentioned*," and of a nominal consideration of 10*s.* to the plaintiff and A. paid by the defendant, (the receipt of which several sums they hereby acknowledged, and from the same released &c. the defendant, the plaintiff and A. conveyed the premises to the defendant. There was also indorsed on the deed a receipt for the 40*l.* It was clearly proved, however, that the sum had never been actually paid; and on this evidence, the plaintiff, in an action for the 40*l.*, obtained a verdict; which the Court, on a motion for leave to enter a nonsuit, allowed him to retain. Mr. Justice *Holroyd* said—"The plaintiff is entitled to our judgment, unless he is estopped, either by the deed of release, or by the receipt indorsed on it. As to the latter, it is sufficient to observe, that, not being under seal, it cannot amount to an estoppel; but can only be evidence for the jury, capable of being rebutted by the other circumstances in the case. And if so, then, as it is admitted that no such payment has actually been made, this receipt becomes of no importance. As to the deed, it seems to me to depend upon the contruction to be given to the words, 'In consideration of the sum of 40*l.* being now so paid *as hereinbefore is mentioned.*' If the deed had absolutely stated a payment, unaccompanied by such words of reference, the case would be very different. But here there are words of reference; and we must, therefore, look to the former part of the deed; and there we find no statement of actual payment, but only of an agreement to pay. It seems to me, therefore, that this does not amount to an estoppel, so as to shut out the plaintiff from proof of the truth of the transaction. Estoppels are odious in the law; and, being so, they ought not to be allowed, unless they are very plainly and clearly made out. That is not the case in this deed." And it is moreover to be observed, that estoppel only applies to the parties to an indenture, and not to third persons; so that, notwithstanding the most positive and explicit statement therein of the payment of the consideration

Estoppel does not bind third persons.

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and singular the —— and hereditaments hereinafter described, and hereby released, or otherwise assured, or intended so to be, together with all the rights, members, and appurtenances thereunto belonging, shall henceforth remain, continue, and be, to the uses, upon the trusts, and for the intents and purposes hereinafter declared concerning the same.

Further *testatum.*

AND THIS INDENTURE FURTHER WITNESSETH, that, for the consideration aforesaid, and also in consideration of the sum of 10*s.* of lawful money aforesaid, paid by the said [*purchaser*] to each of them the said [*vendor's trustee*] and [*vendor*], immediately before the execution of these presents, the receipt whereof is hereby acknowledged,

Vendor and his trustee release to the purchaser.

the said [*vendor's trustee*], according to his estate and interest as such trustee as aforesaid (*c*), by the direction of the said [*vendor*], testified by his execution hereof, *Doth*, by these presents bargain, sell, and release, and the said [*vendor*] *Doth* grant, bargain, sell, release, and confirm, unto the said [*purchaser*] (*d*) and his heirs, (in the actual possession

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money, evidence may be adduced in an action between strangers of the fact of no money having actually passed. On this ground it has been held, that, in proving the settlement of a pauper, the production of an indenture of conveyance, expressed to be made for a pecuniary consideration stated as actually paid, does not conclude the opposite party from proving the real consideration to have been natural love and affection, no payment of money having taken place. *The King* v. *The Inhabitants of Cheadle*, 3 Barn. & Adolph. 833.

Words by which trustees convey, not material.

(*c*) It is usual to qualify a trustee's conveyance by words to this effect, but they may very safely be dispensed with. A person, who appears on the face of a conveyance to be a trustee only, and who covenants merely that he has not incumbered, may fearlessly convey his estate by any of the ordinary words of assurance, not excepting the word *grant*, (as to which, *vide ante*, Vol. 1, p. 425), and without any qualification whatsoever. It is common to find persons perusing drafts on behalf of trustees, insisting, with much pertinacity, on the insertion or omission of words and phrases which are wholly unimportant, and such requisitions are usually acquiesced in, because, though unnecessary for the purpose of protection, they are not otherwise objectionable.

Release should be made to the purchaser.

(*d*) It is in general better to make the release to the purchaser than to the dower-trustee, for the reasons stated *post*, p. 460. The only case in which this is impracticable is, where the purchaser is himself a conveying

of the said [*purchaser*] now being by virtue of a bargain and sale made to him by the said [*vendor*] and [*vendor's trus-*

APPOINTMENT AND RELEASE IN FEE.

Reference to lease for a year.

party, in consequence of his having some interest in the estate in another character, as in the case of a purchase by a mortgagee.

Office of the premises of a deed.

That part of the deed which precedes the *habendum* is denominated the premises. Here are to be found the names of the grantor and grantee, and a description of the subject-matter of the grant. It is not usual or correct to mark the precise duration of the estate in this part of the deed, (Shepp. Touchst. 75), though commonly words of limitation, adapted to the nature of the estate subsequently limited by the *habendum*, are introduced. Thus, where lands are to be conveyed from A. to B. for an estate in fee, or for an estate *pur autre vie*, A. grants to B. and his heirs, the parcels, to hold to him and his heirs for ever, or to him and his heirs during the life of C., as the case may be; but the omission of the words of limitation in the premises would be quite immaterial; indeed, if the name of the grantee were here wholly omitted, and the deed simply imported that the grantor conveyed the parcels, to hold to the grantee, his heirs, &c., the validity of the conveyance would not be affected. *Butler* v. *Dodton*, Carey's Rep. Ch. 86; *Eeles* v. *Lambert*, Aleyn, 41. It is better, however, not designedly to omit the words in question, because, as we shall presently see, an error, which would be otherwise fatal in the *habendum*, might be corrected by the premises.

— of the *habendum*.

The office of the *habendum* is to limit the grantee's estate; and, in modern conveyances, it is usually followed by a declaration of the use, which, being executed by the statute, the releasee or grantee to uses has only an instantaneous seisin, out of which the use is served. This seisin, it is obvious, should be co-extensive with, or at all events not less, in point of duration or extent, than the use so limited. If no express use is declared, it will result to the grantor, unless there be a sufficient consideration to rebut the resulting use, in which case the estate limited to the grantee by the premises or the *habendum* will remain in him.

As to repugnancy between the premises and the *habendum*.

With respect to the rules that obtain where the premises and the *habendum* are repugnant, numerous decisions and *dicta* are to be found in the books. *Vide* cases 5 Com. Dig. 168; 14 Vin. Ab. 149. Though these authorities are not all in perfect harmony, they agree for the most part in the position, that the *habendum* may explain or *enlarge*, but cannot *abridge*, the estate granted by the premises. Examples commonly adduced of the *habendum* being explanatory of the premises are, a grant to A. and his heirs, to hold to him and his heirs for the life of B., in which case A. takes an estate *pur autre vie;* Moore, 876; and a grant to A., B., and C., to hold to A. for life, remainder to B. for life, remainder to C. in fee; in which case A., B., and C. take the several estates expressed in the *habendum*. Dyer

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tee], in consideration of 5*s.* a-piece, by indenture, bearing date the day next before the day of the date of these pre-

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160 b, 361 b. So, under a limitation to A. and his heirs, to hold to him and the heirs of his body, A. will take an estate tail. Co. Litt. 21. a. In all these cases, the *habendum* is not repugnant to, but is explanatory of, the premises, shewing for what period, or in what manner, the persons named in the premises are to take; and in the last, describing the species of *heirs*, of the grantee intended by the general term "heirs" in the premises, namely, heirs of the body. If the premises and the *habendum* expressly create estates of a different nature, that which confers the larger estate will prevail. Thus, under a limitation to A. for life, to hold to him and his heirs, he would take a fee-simple according to the *habendum;* while, in the converse case of a limitation to A. and his heirs, to hold to him for life, he would take the fee according to the premises; Co. Litt. 299. a.; Plow. 152; 8 Rep. 56 b; 14 Vin. Ab. 149; 2 Bac. Ab. 494; the distinction being evidently founded on the doctrine, that a deed is to be construed most strongly against the grantor. But these rules have lost much of their importance since the introduction and universal adoption of uses; it is evident that, in both the cases before suggested, if the *habendum* were followed by a declaration of the use, the nature of the estate which passed by the conveyance would be absolutely measured and fixed by that declaration. Thus, in the last-mentioned case, if the limitation were to A. and his heirs, *habendum* to A. for life, *to the use of A. for life*, notwithstanding the rule negativing the power of the *habendum* to restrict the premises, A. would take no larger estate than an estate for life, and the ulterior use would result to the grantor; *Wilkins* v. *Perrat*, Moore, 876; and the resulting of the use would not be prevented by the fact of a valuable consideration having moved from the grantee to the grantor, because such consideration would be confined to, and satisfied by, the use actually limited. *Wilkes* v. *Leuson*, Dy. 169. See also *Goodtitle* v. *Gibbs*, 5 Barn. & Cress. 719.

Repugnancy in the premises or the *habendum* will yield to the intention collected from the whole instrument.

Questions, however, respecting the relative force of the premises and the *habendum* are sometimes brought into discussion by inaccuracies merely clerical, occurring in one or the other, producing a discrepancy which will necessarily render the deed void for uncertainty, unless it can be removed by the rejection or correction of the repugnant matter. At the present day, deeds are seldom held to be void on the ground of uncertainty, as the Courts never come to this unsatisfactory conclusion until the failure of every attempt to reconcile the various parts of the instrument; and if the intention, upon the whole instrument, be apparent, any repugnant or superfluous clause or expression, in *whatever part of the deed it be found*, would be rejected, in order to give effect to such intention. No

sents, for one year, to be computed from the day next before the day of the date of the said indenture of bargain

technical rule, ascribing greater potency to the premises or the *habendum*, would be allowed to stand in the way of the application of this sound and salutary principle. Thus, if there be a palpable error in any part of the premises, which makes it inconsistent with the *habendum*, the rule often laid down, that, where the *habendum* is repugnant to the premises, it is to be rejected, would not prevent the Court from correcting the error in the premises, instead of rejecting the *habendum*. A direct illustration of this occurs in the case of *Spyve* v. *Topham*, 3 East, 115, where, by an indenture of release (preceded by a lease for a year), made between A., of the first; B., of the second part; and C. (a trustee for B.), of the third part; in consideration of 700*l.* to A. paid by B., and of 10*s.* paid by C., A., by the direction of B., granted *to B.*, in his actual possession, &c., the premises, to hold *to C.*, his heirs and assigns, to such uses as B. should appoint, and in default of appointment to B. and C., and the heirs of B. for ever; the estate of C. being in trust for B.: *The lease for a year was made to C.*, the trustee, corresponding, therefore, with the *habendum* in the release, and not with the premises. The present action was brought by a purchaser to recover a deposit for a defect of title, arising from the alleged invalidity of this conveyance. The Court was of opinion that the words "unto the said C., &c." in the premises, were to be rejected as repugnant to the *habendum* and the rest of the deed; and that, therefore, the objection to the title was untenable.

Error in the name of the releasee rectified.

Had the lease for a year in this case been made to B., the person named in the premises of the release, and not to C., the person named in the *habendum*, no doubt the Court, in order to support the conveyance, would have rejected the *habendum*, or, rather, have rectified it by reference to the other parts of the deed. Such an alteration, indeed, would have been in exact consistency with the rule already adverted to, that the *habendum*, where repugnant to the premises, is to be rejected; an instance of which occurred in the recent case of *Goodtitle* d. *Dodwell* v. *Gibbs*, 5 Barn. & Cress. 709; *S. C.* 8 Dowl. & Ryl. 502; where A., by lease and release, conveyed to B., and to his heirs and assigns, certain freehold hereditaments, to hold the same to the said B., his heirs and assigns, *from and immediately after the death of C.* It was contended, that this was a conveyance of a freehold *in futuro*, and, therefore, void; and though it was admitted, that the *habendum* was not essential to the operation of a deed as a grant, and might, if repugnant to an express grant in the premises, be void, yet it was insisted, that here the grant in the premises was general and indefinite, and not express, and that the *habendum* pointed out and explained the manner in which the grantee was to take, namely, after the decease of C.;

Remarks upon *Spyve* v. *Topham*.

Inconsistent words in the *habendum* rejected.

APPOINTMENT AND RELEASE IN FEE.

and sale, and by force of the statute made for transferring uses into possession), ALL THAT *(describe parcels, consisting of lands and messuages)*, Together with all and singular outhouses, bridges, ways, waters, water-courses, trees, woods, underwoods, hedges, ditches, fences, profits, privileges, easements, advantages, rights, members, and appurtenances whatsoever, to the said hereditaments and premises, or any part or parts thereof, belonging or in anywise appertaining, or usually held, occupied, or enjoyed therewith; *And also*, all the estate, right, title, interest, claim, and demand whatsoever, both at law and in equity, of the said [*vendor's trustee*] and [*vendor*], and each of them, in, or to, or out of the said ——, hereditaments, and premises, and every part thereof, with their appurtenances; *And also*, all deeds, papers, and writings relating to or in anywise concerning the title to the said hereditaments and premises, or any part thereof, either alone, or together with any other hereditaments of less value, now in the custody of the said [*vendor*], or which he can procure without suit (*e*): TO HAVE

Parcels.

General words.

All the estate, &c.

And all deeds, &c.

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and, consequently, the deed was void. But the Court was of opinion, that, in this case, an immediate express estate in fee *was* granted by the premises, and that the *habendum*, being inconsistent, and limited in terms which would defeat the deed, was to be rejected; and, for this construction, they relied on the cases of *Carter* v. *Madgwick*, 3 Lev. 339; and *Jarman* v. *Orchard*, Skinner, 528; Salk. 346; Show. P. C. 199, *S. C.*, where the *habendum* was rejected on precisely similar grounds.

Observations upon the clause granting the deeds.

(*e*) According to the old authorities, a feoffee was entitled to have the title deeds delivered to him in order to defend his possession, unless the feoffor had entered into a general warranty; in which case, as the feoffor had taken upon himself the entire risk, it was considered that he ought to retain the deeds. See Co. Litt. 6. a. And a similar right of retaining the deeds would probably be held to exist, where the grantor retains part of the estate; *Field* v. *Yea*, 2 Durn. & East, 608†; also, where he has en-

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Case of *Field* v. *Yea*.

† This was a strong case, the circumstances being as follow:—A., the defendant, purchased part of a leasehold estate, the residue of which was in mortgage, taking from the vendor a covenant for the production of the deeds, which were in the hands of the mortgagee. He afterwards obtained an assignment of the mortgage, and by that means got possession of the deeds in question. He then transferred the mortgage to the plaintiff; but

AND TO HOLD the said —— and hereditaments, and all and singular other the premises hereby released or otherwise as- APPOINTMENT AND RELEASE IN FEE.

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tered into an unqualified covenant for the production of the deeds to a third person. Upon the principle of the reasoning in question, the purchaser, in a modern conveyance, would (unless in the excepted cases just noticed) be entitled to the custody of the deeds, independently of any express grant of them, as the covenants in such conveyances are almost invariably limited to the acts of the vendor himself. It is usual, however, to insert an express grant of the deeds; and the insertion of such a grant is advisable, the rather because it has been made a question whether, in a conveyance taking effect by force of the statute of uses, the right to the deeds resides in the releasee to uses, or passes with the land by the operation of the statute to the *cestui que use*. A very respectable writer has considered it to be a point clearly settled, that the feoffee or grantee to uses is entitled to the custody of the deeds, because the statute only transfers the legal estate to the use, and does not interfere with the title deeds; 1 Sand. Us. 122; and the early authorities appear to support this opinion; *Estofte* v. *Vaughan*, Dy. 277 a; Earl of *Huntington* v. *Mildmay*, Cro. Jac. 217; *Stockman* v. *Hampton*, Cro. Car. 441; *Reynell* v. *Long*, Carth. 316; though it has had at least one learned dubitant; Harg. n. Co. Litt. 6. a.; and there might seem to have been strong ground to contend, that the statute, having transferred the legal estate to the use, had transferred it with all its incidents, of which the right to the title deeds is one. The question, however, always may be avoided by inserting an express grant of the deeds, and such grant should be made *to the purchaser himself*, who is then entitled *quâcunque viâ datâ;* for, if it be made to a releasee to uses, who is not the purchaser, the question will arise whether such releasee is entitled to the custody of the deeds under the grant, or whether they pass with the estate to the *cestui que use* by the operation of the statute. Where the release to uses, therefore, is made to the dower-trustee, and not to the purchaser, (as it necessarily is when the latter is a conveying party), the grant of the title deeds should be removed from its ordinary position, and inserted in a separate clause; though this is not often done

Whether the deeds pass with the land to *cestui que use*.

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the deed of transfer contained no grant of the deeds, which were retained by the defendant. The plaintiff (the transferree of the mortgage) brought an action of trover against the transferror, on account of the detention of the deeds; but the Court held, that he could not recover them, because the defendant had as good a title to them as himself, (though it will be remembered, that he acquired them in the character of, or as representing, the mortgagee).

APPOINTMENT AND RELEASE IN FEE.

sured, or intended so to be, with their appurtenances, unto the said [*purchaser*], and his heirs, for ever, to the uses and upon the trusts hereinafter declared concerning the same, (that is to say); To SUCH USES, upon such trusts, and for such intents and purposes, and charged and chargeable in such manner and form as the said [*purchaser*] shall, at any time, or from time to time, by any deed or deeds (*f*)

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in practice. Indeed, many practitioners never insert a grant of the deeds, and it might properly be omitted, were it not for the point first above adverted to; for, it should be observed, that whatever question may exist, as to whether, in a conveyance to uses, the right to the deeds is in the releasee or the *cestui que use*, there is no doubt as to its vesting in one or the other, though Mr. Sanders's position, already cited, has sometimes been strangely misconstrued into an expression of a doubt of this nature.

Custody of the title deeds belongs to the legal owner of the property.

The doctrine, that a conveyance of lands carries with it the legal right to the custody of the title deeds, was recognised in the recent case of *Harrington* v. *Price*, 3 Barn. & Adolph. 170, the facts of which were briefly as follow:—In 1803, A. sold and conveyed the estate in question to B.: in 1812, B. conveyed it to his nephew, C., who, in 1826, sold and conveyed it to D., the plaintiff. A., the original vendor, retained the deeds on account of a claim of quit rents. made by the lord of the manor, which was afterwards settled. In 1824, C. brought an action of trover against A. to recover the deeds, and obtained a verdict, but the judgment was not docquetted until 1827. A. avoided the execution of the *fi. fa.* in this action by absconding, and afterwards mortgaged the property to and deposited the deeds with E., who had no notice of the previous transactions. The present action was brought by D. against E. for the recovery of the deeds, and he was held to be entitled to a verdict, on the ground of the general doctrine, that whoever was entitled to the land was also entitled to the deeds affecting it; and that this legal right was not taken away by the neglect of B. in leaving the deeds in the hands of his vendor, that of the defendant being at least equal in not inquiring as to the possession of the lands before he lent his money.

In accordance with the principle of the last case it has been held, that where A. delivered to a conveyancer the title deeds of an estate, of which he was seised *jure uxoris*, in order that the property might be conveyed to such uses as the wife should appoint, and, in default of appointment, to a son of the depositor and his wife in fee, and such conveyance was executed accordingly, the depositor could not maintain an action of detinue for the recovery of the title deeds, because he was no longer the owner of the property. *Phillips* v. *Robinson*, 12 Moore, 308.

Limitations

(*f*) As the object is to give the purchaser as beneficial and unrestricted

direct and appoint; and in default of such direction or appointment, To THE USE of the said [*purchaser*] and his assigns, during the term of his natural life, without impeachment for any manner of waste; And immediately after the determination of that estate by any means in his lifetime, To THE USE of the said [*trustee*], his executors and administrators (*g*), during the life of the said [*purchaser*], *Upon*

APPOINTMENT AND RELEASE IN FEE.

Uses to prevent dower.

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an ownership as possible, consistently with the exclusion of the dower, it seems desirable not o annex to the appointment the requisition of any particular mode of execution or attestation, but to make the power exercisable simply by deed. It is unnecessary to extend it to testamentary dispositions, for, as the will does not take effect until the purchaser's death, when the trustee's estate ceases, the power is not wanted for the purpose of over-riding his estate; and the interposed estate of the trustee prevents the dower from attaching at all during the life of the purchaser, so that either his heir or devisees would take the property exempt from the dower.

should give a power of appointing by deed generally.

(*g*) The trustee's estate *pur autre vie* is more usually limited to his executors or administrators than to his heirs; because, in general, it is more easy to find an executor or administrator, and he is less likely to be under the disability of infancy, insanity, &c., than an heir; though, as such estates are not often required to be conveyed, disabilities of this nature produce but little practical inconvenience. There is also the possible event of the failure of heirs; which event, however, rarely happens, except in the case of bastards, who can have no heirs other than those which spring from themselves. Indeed, some practitioners prefer making the limitation to the heirs on account of the greater improbability that there should be a want of real than of personal representatives; but among persons of the class from which trustees are generally selected, it does not often occur that the amount of personal estate left by a deceased person is so inconsiderable as to render it unnecessary that administration should be taken out; and even if the estate be insolvent, a creditor commonly administers; nor is it certain that, within the compass of an estate *pur autre vie*, the representation will fail by death. And let it be observed, that, in all these cases, the defect may be supplied by obtaining from the Ecclesiastical Court a limited administration. It seems, however, not to be very material which mode of limitation is adopted; and this observation may *now* be made without any reservation in regard to cases in which the subject of the conveyance is a rent or other incorporeal hereditament, since it has been recently settled, that the 12th section of the Statute of Frauds (29 Car. 2, c. 3), vesting estates *pur autre vie*, of which there is no special occupant, in the executor or administrator, extends to incorporeal hereditaments. (*Vide post*, Vol. 8, p. 187).

Mode of limiting estate of dower trustee.

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Rents, &c. *pur autre vie* should be limited to the heirs.

APPOINTMENT AND RELEASE IN FEE.

trust, nevertheless, for and for the only benefit of the said [*purchaser*] and his assigns; And immediately after the determination of the said estate hereby limited to the said [*trustee*], his executors and administrators, To THE USE of the said [*purchaser*], *his heirs and assigns, for ever; and to, for, or upon no other use, trust, intent, or purpose whatsoever: AND the said [*vendor's trustee*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*purchaser*] and his heirs, That he the said [*vendor's trustee*] hath not at any time heretofore made, done, executed, or permitted any act, deed, matter, or thing, whereby or by means whereof the said ——, hereditaments, and premises hereby released, or intended so to be, or any part thereof, are or is charged, incumbered, or in anywise prejudicially affected in title, estate, or otherwise howsoever. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*purchaser*] and his heirs, That, notwithstanding any act, deed, matter, or thing whatsoever, made, done, or permitted to the contrary by the said [*vendor*], or any person or persons rightfully claiming through, under, or in trust for him, the said [*vendor*] and [*vendor's trustee*] now have in themselves, or one of them hath in himself, good right and absolute authority by these presents to release or otherwise assure the said ——, hereditaments, and premises hereby released, or intended so to be, and every part of the same, with the appurtenances, unto the said [*purchaser*] and his heirs, for ever, to the uses hereinbefore declared concerning the same, according to the true intent and meaning of these presents; *And also*, that, notwithstanding any such act, deed, matter, or thing as aforesaid, the said ——, hereditaments, and premises hereby released, or intended so to be, shall, from time to time, and at all times hereafter, remain to the uses hereinbefore declared concerning the same, and shall be peaceably and quietly held and enjoyed accordingly (*h*), without any eviction, in-

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Covenant by vendor's trustee that he has not incumbered.

Vendor covenants, that, notwithstanding any act by him, &c.

—he and his trustee have power to assure;

—that premises shall remain to the uses aforesaid;

As to the proper form of the covenant for quiet enjoyment.

(*h*) If the limitations are simply to the purchaser in fee, or to such uses as the purchaser shall appoint, and, in default of appointment, to him in fee, the covenant that the grantors have right to convey is followed by a covenant for quiet enjoyment by the purchaser, his *heirs and assigns*, or

APPOINTMENT AND RELEASE IN FEE.

terruption, or denial whatsoever from or by the said [*vendor*], or any person or persons whomsoever rightfully claiming any estate, right, title, or interest, at law or in equity, in, to, or out of the said hereditaments and premises, or any part thereof, by, from, under, or in trust for him the said [*vendor*], or by or through his acts, defaults, privity, or procurement; And that, free and clear, or freely, clearly, and absolutely discharged from, or by the said [*vendor*], his heirs, executors, or administrators, effectually kept indemnified against, all former or other estates, rights, titles, charges, and incumbrances whatsoever, made, created, or occasioned by the said [*vendor*], or any person or persons rightfully claiming from, through, under, or in trust for him, or by or through his acts, defaults, privity, or procurement; *And further*, that the said [*vendor*] and his heirs, and every person whosoever, rightfully claiming any estate, right, title, charge, or interest, at law or in equity, in, to, or out of the said ——, hereditaments, and premises hereby released, or intended so to be, or any part thereof, from, through, under, or in trust for him or them, will, from time to time, and at all times hereafter, on the request, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, acknowledge, levy, suffer, or execute and perfect every such lawful and reasonable act, deed, conveyance, or assurance in the law whatsoever, either by fine, common recovery, release, confirmation, or otherwise howsoever, for more effectually or satisfactorily appointing, releasing, confirming, or otherwise assuring the said ——, hereditaments, and premises hereby released, or intended so to be, and every part of the same, with their appurtenances, To the uses and in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised and requir-

— free from incumbrances by the vendor, &c.

And for further assurance.

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by him, *his appointees, heirs, and assigns*, as the case may be; and the latter form is sometimes used where the limitations are, as in the text, to the ordinary uses to prevent dower; but, in this case, it is not quite correct, because the terms of the covenant do not include the estate *pur autre vie* of the dower-trustee. In such case the language of the covenant should be, that the lands shall remain to the uses before declared.

APPOINTMENT AND RELEASE IN FEE.

ed, [so as such further assurances, or any of them, shall not contain in them, or imply, any other or more general covenant or warranty than against the acts, deeds, and defaults of the person or persons who shall be required to make or execute the same (*i*): and so as the person or persons who

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Effect of the restrictive words usually added to a covenant for further assurance.

(*i*) The words within brackets are evidently intended to have a restrictive operation; they assume that, without such a qualification, the covenantor would be compellable to enter into *absolute* covenants; but so far is this from being correct, that it has been decided, that the covenantor, in a covenant for further assurance, cannot be required to enter into *any* covenants or warranty of title whatever. Thus, in *Coles* v. *Kinder*, Cro. Jac. 571, where A., in consideration of 20*l.*, having promised to assure lands by such reasonable assurance as by B. should be advised and required, refused to execute an indenture of feoffment, with covenants against his own incumbrances, and for further assurance. B. brought an action of *assumpsit*. The defendant demurred, on the ground, that, though he was to make assurance, he was not to be bound by any covenants; and of this opinion was the Court, it being observed, that, "although these covenants are ordinary and reasonable, yet the agreement, not being to make it with reasonable covenants, but only reasonable assurance, he is not bound to seal it, for it is not any part of the assurance; and the assurance may be without any covenants." So, in *Stanroyde* v. *Locock*, Cro. Jac. 115, it was held, that an agreement to make such further assurance of certain lands as D. should advise, was not broken by a refusal to enter into an obligation of 40*l.*, as advised by D., for the enjoyment of the lands against all persons. The consequence of this doctrine is, that the words in brackets, instead of being restrictive, have a precisely opposite effect; as, by negativing the covenantor's obligation to enter into any covenants extending beyond his own acts, they *imply* an obligation in him to enter into covenants embracing those acts; to which, we have seen, the covenant in question would not be construed to extend.

Covenant for further assurance does not entitle a purchaser to further evidence of title.

It has been held that the covenant for further assurance does not entitle a purchaser, who has neglected to obtain evidence of facts material to his title at the time of his purchase, afterwards to call for the production of such evidence, or to have the future preservation and production of the documents containing the evidence secured to him. *Hallett* v. *Middleton*, 1 Russ. 243. So, if the purchaser has omitted to take a covenant for the production of deeds, he cannot, under the covenant for further assurance, require the vendor to enter into such a covenant. See *Fain* v. *Ayres*, 2 Sim. & Stu. 533. See farther as to the covenant for further assurance, *post*, Vol. 8, p. 296.

As to supplying

But, though little encouragement is given to a purchaser who goes into

APPOINTMENT AND RELEASE IN FEE.

shall be required to make or execute such further assurances, shall not for that purpose be compellable to go from his, her, or their usual place or places of abode]. IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals (*k*) the day and year first hereinbefore written.

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defects of title, &c. after the completion of the contract.

a Court of equity after the completion of his purchase, to repair the consequences of his own negligence, by seeking to obtain that which he should have required at the time, the case is different where the purchaser's omission has been induced by the fraud, or even the unintentional misrepresentation of the vendor. A signal instance of the former has been already stated, (*vide ante*, p. 361); and we have an illustration of the latter in a case before Sir *W. Grant*, where a purchaser filed a bill against the vendors and an attorney, who had the custody of a certain will, through which the purchaser's title was derived, praying that it might be proved in the Ecclesiastical Court, or deposited with one of the Masters for safe custody; and stating, that, at the time of the purchase, the vendors represented that the will had been duly proved, which afterwards was discovered not to be the fact: under these circumstances his Honour decreed (with the consent of certain legatees, who were interested in the will, and were parties to the suit), that the will should be deposited with the Master; and that the vendors, whose misrepresentation, though probably *unintentional*, had caused the necessity for the suit, should pay all the costs. *Harrison* v. *Coppard*, 2 Cox, 318.

(*k*) The dower-trustee should execute the deed, to prevent the possibility of his disclaiming the estate, which would have the effect of defeating the purpose for which it was created. It is clear that the mere fact of the trustee not having executed the deed, by which the trust-property was vested in him, would not justify his representatives in refusing to convey the legal estate. *Goodson* v. *Ellisson*, 3 Russ. 583. In this case, though the co-heiresses at law of the trustee, by their answer, declared their belief that he had never accepted the trusts, yet no proof seems to have been adduced in support of the allegation.

ASSIGNMENT OF TERM TO ATTEND THE INHERITANCE.

ASSIGNMENT *of a* TERM IN TRUST *to* ATTEND *the* INHERITANCE (*a*). *(Intended to accompany the last Precedent).*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, BETWEEN [*vendor's trustee*], of &c., of the first part; [*vendor*], of &c., of the second

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Notice of purchase should be given to the trustees of the term.

(*a*) The observations which have been made in a former note as to the danger of mortgagees leaving terms outstanding, apply with equal force to purchasers. (*Vide ante*, Vol. 5, pp. 417, 480). One suggestion, however, may here be added, namely, that if the precaution of assigning the term be not taken, notice of the purchaser's title should be given to the trustee in whom it is vested, after which it would be clearly a breach of trust in him to assign the term to any other person. Indeed, it seems to be the better opinion, that a trustee, having received such notice, could not, by his assignment, transfer to a third person the benefit of the legal title, unaffected by the trust which attached to the estate in his hands; for there is strong ground to contend, that the notice operates as an appropriation of the benefit of the attendant term, by the person giving it constituting the termor *his* trustee; and then, it would seem to be contrary to the first principles of equity, that a trustee should be able to to confer a title on a person *avowedly dealing with him in that character*, discharged from the trust. (See some ingenious observations, Hayes's Concise Conv. p. 206). And this conclusion seems to be fortified by the recent decisions establishing the doctrine, that notice to the owner of the legal title confers precedence among contending equitable alienees, (*vide ante*, Vol. 5, p. 579); for it is impossible, on any intelligible principles, to except terms of years from the operation of this doctrine. It would still, however, be necessary to find the trustee of the term, for the purpose of giving him the notice in question; and, in the case of a dormant representation, to constitute a representative in the usual manner by means of a limited administration. This having been done, the purchaser would probably prefer taking an assignment of the term to a trustee of his own nomination, to obviate any inconvenience that might arise from leaving the term outstanding. If the term be wanted as a protection against dower, an assignment of it is essential. (*Vide ante*, p. 421).

part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*], of &c., of the fourth part; WHEREAS, by a certain indenture, bearing date on or about the —— day of ——, 18—, and made between [A.], of the one part, and [B.], of the other part; the said [A.], for the considerations therein mentioned, granted and demised unto the said [B.], his executors, administrators, and assigns, *All that (describe parcels), To hold* the same unto the said [B.], his executors, administrators, and assigns, for the term of 1000 years thence next ensuing, by way of mortgage, for securing the payment of the principal sum of £—— and interest (*b*): AND WHEREAS, by divers mesne assignments, and other effectual means or assurances in the law, and, ultimately, by a certain indenture, bearing date on or about the —— day of ——, and made between [C.], of the first part; [D.], of the second part; the said [*vendor*], of the third part; and the said [*vendor's trustee*], of the fourth part; All and singular the —— and premises comprised in and demised by the hereinbefore recited indenture of demise or mortgage, were assigned unto the said [*vendor's trustee*], his executors, administrators, and assigns, for the residue of the said term of 1000 years, in trust to attend the inheritance, for the said [*vendor*], his appointees, heirs, and assigns (*c*) (*d*):

ASSIGNMENT OF TERM TO ATTEND THE INHERITANCE.

Recital of deed creating the term;

—of last assignment of the term;

(*b*) Sometimes, instead of reciting the deed creating the term, it is only incidentally noticed in the recital of the last assignment, thus—

"AND WHEREAS, by an indenture of assignment made the —— day of ——, &c., the residue of a certain satisfied term of —— years, created by an indenture of demise or mortgage, bearing date on or about the —— day of ——, of and in ALL THAT *(describing parcels)*, was assigned unto the said [*trustee*], his executors," &c.

Short notice of the creation of the term.

(*c*) The title to the fee-simple, if it has undergone any change since the last assignment of the term, should be shortly recited.

(*d*) Where the trustee has died intestate, and limited administration has been taken out for the purpose of assigning the term, the following recital may be added:

"AND WHEREAS the said [*trustee*] having departed this life without making any assignment of the hereditaments and premises included in the said term of —— years, and

Recital of limited administration.

ASSIGNMENT OF TERM TO ATTEND THE INHERITANCE.

—of contract for sale and contemporaneous conveyance of the fee.

And whereas the said [*vendor*] lately contracted and agreed with the said [*purchaser*] for the absolute sale to him of the inheritance in fee-simple, in possession, of and in (*e*) the said ——, and hereditaments and premises comprised in the said term of 1000 years, free from all incumbrances, at the price of £——; and, accordingly, by indentures of lease, and appointment and release, the indenture of lease bearing date the day next before the day of the date of these presents; and the indenture of appointment and release bearing even date with, and executed immediately before the execution of these presents, and made between the said [*vendor*], of the first part; [*vendor's dower-trustee*], of the second part; the said [*purchaser*], of the third part; and [*purchaser's dower-trustee*], of the fourth part; the said hereditaments and premises (*f*), by the description of *(describe parcels as in the conveyance)*, with their appurtenances, have, in consideration of the said sum of £—— paid by the said [*purchaser*] to the said [*vendor*], been conveyed and assured (*g*), *To such uses*, for such estate or estates, in such proportions, and for such intents and purposes, as the said [*purchaser*] by any deed or deeds shall direct or appoint; And, in default of such di-

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having died intestate as to the same, letters of administration limited to the said [*trustee's*] right, estate, and interest in the said term, have lately been granted to the said [*administrator*] by the Prerogative Court of the Archbishop of Canterbury, in order to enable the said [*administrator*], as the special representative of the said [*trustee*], deceased, to assign the legal estate and interest in the said hereditaments included in the said term of —— years so vested in the said [*trustee*], deceased, as aforesaid.

(*e*) If the contract includes part only of the premises affected by the term say—

"part of," &c.

(*f*) If part only—

"so purchased by the said [*purchaser*] as aforesaid."

(*g*) Some persons refer to the uses in more general terms, thus—

"To uses for the benefit of the said [*purchaser*], his appointees, heirs, and assigns."

rection or appointment, *To the use* of the said [*purchaser*] and his assigns, during the term of his natural life, without impeachment of waste; with a limitation, *To the use* of the said [*purchaser's dower-trustee*], his executors and administrators, during the life of the said [*purchaser*], *In trust* for him and his assigns, with remainder *To the use* of the said [*purchaser*], his heirs and assigns, for ever: AND WHEREAS the said [*purchaser*] is desirous that the residue of the said term of 1000 years (*h*) should be assigned to the said [*purchaser's trustee*], his executors, administrators, and assigns, in trust for the said [*purchaser*], his appointees, heirs, and assigns, and to attend the inheritance, according to the uses of the said indenture of appointment and release of even date herewith: NOW THIS INDENTURE WITNESSETH, that, for the considerations aforesaid, and also in consideration of the sum of 10*s.* of lawful money of Great Britain and Ireland paid by the said [*purchaser's trustee*] to the said [*vendor's trustee*] immediately before the execution of these presents, the receipt whereof is hereby acknowledged, the said [*vendor's trustee*], by the direction and appointment of the said [*vendor*], and on the nomination of the said [*purchaser*], testified by their severally executing these presents, [*Hath* bargained, sold, assigned and transferred, and] by these presents *Doth* bargain, sell, assign, and transfer unto the said [*purchaser's trustee*], his executors, administrators, and assigns (*i*), *All that* the said *(words descriptive of the subject-matter of the conveyance)*, hereinbefore described, and all and singular other the premises comprised in, and demised by, the

ASSIGNMENT OF TERM TO ATTEND THE INHERITANCE.

Testatum.

Vendor's trustee, by the direction of vendor, and on the nomination of purchaser, assigns to purchaser's trustee —the premises.

(*h*) If part only, say—

"so far as the same relates to the said hereditaments and premises so purchased by him as aforesaid."

Variation where assignment is of part only.

(*i*) If part only, say—

"*All* so much and such part or parts of the said messuage, &c. comprised in and demised by the hereinbefore recited indenture of demise or mortgage, of the —— day of ——, 18—, as are comprised in or expressed to be assured by the said indenture of appointment and release, of even date herewith."

ASSIGNMENT OF TERM TO ATTEND THE INHERITANCE.

hereinbefore recited indenture of demise and mortgage, of the —— day of ——, 18—, and also expressed to be appointed and conveyed by the said indenture of appointment and release of even date herewith, and all the *rights, members, and appurtenances thereunto belonging or appertaining; *And also* all the estate, right, title, interest, claim, and demand whatsoever, both at law and in equity, of the said [*vendor's trustee*], in, to, or out of the same premises, or any part thereof: To HAVE AND TO HOLD the said ——, and all and singular other the premises hereby assigned, or intended so to be, with their appurtenances, unto the said [*purchaser's trustee*], his executors, administrators, and assigns, henceforth during all the residue or remainder now unexpired of the said term of 1000 years, and for all other the estate, term, and interest of the said [*vendor's trustee*] therein; *In trust*, nevertheless, to be disposed of by the said [*purchaser's trustee*], his executors or administrators, as the said [*purchaser*], his appointees, heirs, or assigns, shall, from time to time, direct and appoint; and, in the mean time, to attend, wait upon, and be subservient to the freehold and inheritance of the same premises, according to the uses limited thereof by the said recited indenture of appointment and release of even date herewith, in order to protect the same from all mesne charges, and incumbrances, if any such there be; And upon or for no other trust, intent, or purpose whatsoever. AND the said [*vendor's trustee*], for himself, his executors, and administrators, doth hereby covenant and declare with and to the said [*purchaser's trustee*] his executors, administrators, and assigns, that he the said [*vendor's trustee*] hath not at any time or times heretofore made, done, executed, or committed, or knowingly suffered any act, deed, matter, or thing whatsoever, whereby, or by means whereof, the said —— and premises hereby assigned, or intended so to be, or any part thereof, are or is impeached, charged, incumbered, or in anywise affected in title, charge, estate, or otherwise howsoever. IN WITNESS, &c.

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Habendum.

In trust for purchaser, and to attend the inheritance.

Covenant by vendor's trustee that he has not incumbered.

APPOINTMENT

APPOINTMENT *in Fee* (*a*) *to* USES *to* PREVENT DOWER. *(Variation where the Property is sold* SUBJECT *to a* MORTGAGE *for a* TERM (*b*). *(A short Form).*

APPOINTMENT IN FEE.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the first part; [*purchaser*], of &c., of the second part; and [*purchaser's trustee*], of &c., of the third part: WHEREAS (*c*) by indentures of lease

Parties.

Recitals.

(*a*) The advantages and disadvantages attending the conveyance by appointment, as compared with a lease and release, have already been pointed out. (*Vide ante*, p. 449). The necessity of choosing between these assurances, of course, only arises, when the vendor has both a power, and an estate co-extensive with that power; which is the effect in substance of the ordinary uses to prevent dower; but the precedent in the text is equally adapted to a case in which the vendor has a power only, and in which therefore he has no such choice.

(*b*) A mortgage *for a term*, and not in fee, has been selected for the variation, because, as such a mortgage merely subtracts the term from the vendor's estate, without disturbing the uses of the inheritance out of which it is carved, the form of the conveyance is not altered by the existence of such a mortgage; whereas, if the mortgage were *in fee*, the vendor, having only the equity of redemption of the inheritance, and not the legal inheritance subject to a term, as in the former case, would have no estate which could be the subject of an appointment; though, as we shall presently see, it is usual to convey interests of this kind by lease and release, for which a distinct precedent will be given.

Form of conveyance not varied by a mortgage for a term.

(*c*) If it is desirable, for the sake of brevity, or for any other reason, to avoid referring to the conveyance, the recital may be thus—

"AND WHEREAS the hereditaments hereinafter described, and hereby intended to be appointed, now stand limited to such uses, for such estates, and in such manner and form, as the said [*vendor*] shall by any deed or deeds direct or appoint; and, in default of such direction or appointment,

Recital that hereditaments hereby appointed stand limited to certain uses.

APPOINTMENT IN FEE.

and release, *(shortly recite deeds creating the power)* (*c*); AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said premises, for an estate of inheritance in fee-simple (*d*), at or for the price or the sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited contract, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*vendor*] at or immediately before the execution of these presents, the receipt whereof, and that the same is in full for the absolute purchase of the said premises as aforesaid the said [*vendor*] doth hereby acknowledge, and therefrom doth absolutely discharge the said [*purchaser*], his appointees, heirs, and assigns (*e*), he the said [*vendor*], by virtue and in execution of the power reserved to him by the hereinbefore recited indenture of release (*f*), and of all other powers enabling him in this behalf, *Doth*, by these presents, absolutely limit,

Testatum.

In consideration of £—— vendor appoints.

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to uses for the benefit of the said [*vendor*], his heirs and assigns for ever."

It is not absolutely necessary to refer to the power at all. If no such reference be made, the only recital will be, that the purchaser has contracted for the purchase of the fee-simple, and then, by virtue of all powers enabling him, the vendor will appoint to the uses, and covenant generally that he has power to appoint, &c.

(*c*) If the sale is subject to an existing mortgage, shortly recite the mortgage deed, and add—

Variations where conveyance is subject to a mortgage.

"AND WHEREAS there is now owing to the said [*mortgagee*], by virtue of his said mortgage security, the principal sum of £——, but all interest thereon hath been paid by the said [*vendor*] up to the day of the date of these presents."

(*d*) "subject to the said mortgage debt, but free from all other incumbrances."

(*e*) "And also in consideration of the covenant of the said [*purchaser*] to pay the said mortgage debt of £——, and the interest to become due thereon hereinafter contained."

(*f*) If the recital be in general terms, that the hereditaments stand limited, &c., *ut ante*, p. 472, instead of the words in the text, say—

direct, and appoint, that ALL THAT *(describe parcels)*, together with all and singular the rights, members, and appurtenances to the same premises belonging, shall, immediately after the execution of these presents, remain, continue, and be to the uses following, that is to say, *To such uses*, and for such estate or estates, intents and purposes, and in such manner and form, as the said [*purchaser*] shall at any time, or from time to time, by any deed or deeds, direct or appoint; and, in default of such direction or appointment, *To the use* of the said [*purchaser*] and his assigns, during his natural life, without impeachment of waste; and immediately after the determination of that estate by any means in his life-time, *To the use* of the said [*trustee*], his executors, and administrators, during the life of the said [*purchaser*], *Upon trust, nevertheless*, for the said [*purchaser*] and his assigns; and immediately after the determination of the estate lastly hereinbefore limited, *To the use* of the said [*purchaser*], his heirs and assigns for ever: And to, upon, or for no other use, trust, intent, or purpose whatsoever. AND the said [*vendor*] for himself, his heirs, executors, and administrators, *Doth* hereby covenant with the said [*purchaser*] and his heirs, that, notwithstanding any act, deed, matter, or thing, made, done, or permitted by the said [*vendor*] to the contrary (*g*), the said recited power is, at the time of the execution of these presents, a good, valid, and subsisting power; and that, notwithstanding any such act, deed, matter, or thing, as aforesaid, the said [*vendor*] now hath in himself lawful and absolute authority, by these presents, to limit or appoint the said —— and premises hereby appointed, or intended so to be, with the appurtenances to the uses aforesaid, according to the true intent of these presents; *And also*, that notwithstanding any such act, deed, matter, or thing, as aforesaid, the said —— and premises shall henceforth remain and be to the uses herein-

APPOINTMENT IN FEE.

Uses to prevent dower.

Vendor's covenants for title,

"By virtue and in execution of the hereinbefore recited power or authority, and of all other powers, &c.

(*g*) If the sale is subject to the mortgage, say—

"except as hereinafter mentioned."

APPOINTMENT IN FEE.

before declared concerning the same, and shall or may be peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without any interruption or denial whatsoever by the said [*vendor*], or his heirs, or any person or persons claiming under or in trust for him or them; And that, free and clear, and by the said [*vendor*], his heirs, executors, or administrators, effectually exonerated from all charges and incumbrances whatsoever, created or occasioned by the said [*vendor*], or any person or persons whomsoever, claiming under or in trust for him (*h*): *And lastly*, that the said [*vendor*] and his heirs, and every person whosoever claiming any estate, right, title, or interest, at law or in equity, in, to, or out of the said —— and premises hereby appointed, or intended so to be, or any part thereof, by, from, under, or in trust for him or them (*i*), will or shall at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, acknowledge, levy, suffer, or execute every such lawful act, deed, appointment, conveyance, or assurance in the law whatsoever, for more effectually appointing, confirming, or otherwise assuring the said —— and premises hereby appointed, or intended so to be, with the appurtenances, to the uses aforesaid, or to such uses, and for such other purposes, as the said [*purchaser*], his appointees, heirs, or assigns, shall order or direct, and in such manner as by him or them, or his or their counsel in the law shall be reasonably advised and required, [so as such further assurances shall not contain any more general warranty than against the acts and defaults of the person or persons who shall be required to

And for further assurance.

(*h*) Add, if the sale is subject to the mortgage—

Variation where conveyance is subject to a mortgage-term.

" except the hereinbefore recited mortgage-term of one thousand years, created thereof as aforesaid, and the said principal sum of £——, thereby secured, with the interest henceforth to accrue due thereon."

(*i*) Add, if the exception *supra* be inserted—

" except the person whose estate or interest is hereinbefore excepted."

make or execute the same, and so as such person or persons shall not be compellable to go from his, her, or their usual place or places of abode] (*k*). IN WITNESS, &c. APPOINTMENT IN FEE.

(*k*) Add, if the sale is subject to the mortgage—

"And the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*vendor*], his heirs, executors, and administrators, that he the said [*purchaser*], his heirs, executors, or administrators, will pay the said principal sum of £——, owing to the said [*mortgagee*] as aforesaid, and the interest henceforth to become due thereon; and will at all times hereafter effectually keep indemnified the said [*vendor*], his heirs, executors, and administrators, from all actions, suits, costs, damages, and expenses whatsoever, by reason of the non-payment thereof." Covenant by purchaser to pay the mortgage debt.

RELEASE *in Fee by a Vendor claiming by* DESCENT, *to a Purchaser, to Uses excluding Dower, so far as may be, without a Trustee. (Variation, by adding a* COVENANT *to* LEVY *a* FINE *to extinguish the Wife's* DOWER (*a*)). *(A short Form).* RELEASE IN FEE.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c. (*b*), of the one part; and [*purchaser*], of &c., of the other part: WHEREAS [*vendor's father*], late of ——, deceased, being at the time of his death Parties. Recital of ancestor's seisin, death, &c.

(*a*) The fee having descended upon the vendor, if he were married, his wife would be dowable, supposing her claim to dower not to have been barred by a jointure, or excluded by means of the assignment of an outstanding term. A variation adapted to this circumstance, therefore, has been added.

(*b*) If the wife is a party, add—

"and [*wife*] his wife."

RELEASE IN FEE.

seised of, and absolutely entitled to, the hereditaments, hereinafter described, for an estate of inheritance in fee-simple in possession, died intestate as to the said hereditaments on the —— day of —— last, leaving the said [*vendor*] his heir-at-law, the said [*vendor*] being the eldest son of the said [*father*] by [*father's wife*], his late wife, now deceased, and with whom the said [*father*] intermarried on the —— day of ——, the marriage having been solemnized in the parish church of —— on the —— day of —— (*c*); *(recite contract for purchase, ut ante,* p. 452*)* (*d*); NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— of lawful British money, paid by the said [*purchaser*] to the said [*vendor*] at the time of the execution of these presents, the receipt of which said sum he the said [*vendor*] doth hereby acknowledge, and therefrom doth release and discharge the said [*purchaser*], his appointees, heirs, executors, administrators and assigns, for ever, by these presents, the said [*vendor*] *Hath* granted, bargained, sold, released, and confirmed, and *Doth* hereby grant &c. (*e*), unto the said [*purchaser*] and his heirs, *(describe parcels);* and all rights, ways, easements, liberties, privileges, and appurtenances, to the said —— and hereditaments belonging, or in anywise appertaining, (which said hereditaments and premises are now in the actual possession of the said [*purchaser*], by virtue of a bargain and sale to him thereof made by the said [*vendor*] for a pecu-

Vendor in consideration of £——, releases to purchaser.

Reference to lease for a year.

(*c*) If the practice, often recommended in the course of this work, of stating facts of this kind in the recitals had prevailed for the last century, how much would the procuration of evidence in establishment of titles have been facilitated!

(*d*) If the vendor's wife joins, add—

Recital that vendor's wife has consented to join.

"AND WHEREAS the said [*wife*], the wife of the said [*vendor*], hath consented to concur with him in levying a fine of the said hereditaments, for the purpose of extinguishing her dower therein.

(*e*) Sometimes the dowress joins in the release, but this is quite unnecessary, as the fine is the only assurance by which her dower can be affected. Indeed, her junction in the declaration of the uses, though usual, is not essential.

niary consideration, by indenture bearing date the day next before the day of the date of these presents, and by force of the statute made for transferring uses into possession); And the reversion and reversions, remainder and remainders thereof; And all the estate, right, title, interest, property, claim, and demand whatsoever, of the said [*vendor*], of, in, and to the said hereditaments and premises; To HAVE AND TO HOLD the said —— hereditaments and premises hereby released, or intended so to be, with their appurtenances, unto the said [*purchaser*] and his heirs, To SUCH USES (*g*), and for such estates and interests, intents and purposes, as the said [*purchaser*] by any deed or deeds to be legally executed, or by his last will to be signed and published in the presence of and attested by three witnesses, shall direct or appoint; And in default of such direction or appointment, To THE USE of the said [*purchaser*], his heirs and assigns for ever (*h*): AND the said [*vendor*], for him-

RELEASE IN FEE.

And the reversion, &c.

Habendum.

Vendor cove-

(*g*) If it be wished to avoid limiting an estate to a trustee, and to exclude dower, so far, and so far only as is consistent with this object, the uses in the text may be substituted for the ordinary limitations to prevent dower. (*ante*, p. 461). They would have the effect of excluding the dower, as against the appointees of the purchaser by deed or will, but not as against his heir, or his alienees not claiming by appointment; for, the purchaser being seised of the inheritance in possession, and not, as under the usual limitations to prevent dower, of an estate for life, with a remainder in fee, separated by an intervening estate *pur autre vie* in the trustee, the dower attaches as to all persons being *in* under the purchaser. The exclusion of dower, therefore, in the present case, is carried just so far as the purposes of alienation require; and beyond this, perhaps, in strict justice to the widow, it ought not to go, she being as proper an object of regard, as the heir, who may be a very remote relative of the ancestor. An objection to the plan, however, is, that if the purchaser should, by accident or design, convey by virtue of his ownership, instead of exercising his power, the dower would be let in, to the prejudice of the alienee, who might be a purchaser for valuable consideration; and difficult questions sometimes arise, upon the construction of instruments, whether they operate as appointments or not. For these reasons, it seems advisable to adhere to the ordinary limitations to prevent dower, rather than to adopt those in the text.

Remarks on the limitations in the text.

(*h*) "AND the said [*vendor*], for himself, his heirs, executors, and administrators, *Doth* hereby covenant with the said [*purchaser*], his appointees, heirs, and assigns, that

Covenant by the vendor that he and his wife will levy a fine.

RELEASE IN FEE. — Covenants that, notwithstanding &c., he has power to convey.

self, his heirs, executors, and administrators, *Doth* hereby covenant with the said [*purchaser*], his heirs, and assigns, in manner following, (that is to say), that, notwithstanding any act, deed, matter, or thing by the said [*vendor*], or the said [*vendor's father*], deceased, made, done, occasioned, or knowingly suffered, he the said [*vendor*] (*i*), at the time of the sealing and delivery of these presents (*k*), hath in himself full power, and lawful and absolute right, by these presents (*l*), to grant and assure the said ground, buildings, hereditaments, and premises hereinbefore released, or in-

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the said [*vendor*] and [*wife*], his wife, (she hereby consenting), will, at the request of the said [*purchaser*], but at the costs and charges of the said [*vendor*], as of last —— term, next —— term, or any subsequent term, acknowledge, and levy unto the said [*purchaser*], or his heirs, before his Majesty's Justices of the Court of Common Pleas at Westminster†, one fine *sur connuzance de droit come ceo, &c.*, with proclamations, according to the usual course of fines in such cases used, of the said —— and hereditaments hereby released, or intended so to be, with the appurtenances, by the names and description of *(insert parcels as in fine‡)*, or by such other convenient names and descriptions, quantities and qualities, as shall be thought proper to comprise the same; And it is hereby declared and agreed by and between the said parties to these presents, that the fine to be levied by the said [*vendor*] and [*wife*], his wife, of and concerning the said —— and hereditaments, either in manner aforesaid, or any other manner, shall, immediately after the levying of the same, operate and enure to the uses hereinbefore expressed and declared concerning the same hereditaments."

Declaration that fine shall enure to uses aforesaid.

(*i*) " and the said [*wife*], his wife.

(*k*) " have in themselves, or one of them hath in himself or herself, full power, &c."

(*l*) " and by the said fine to be levied as aforesaid or one of them."

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† Fines of lands in the principality of Wales are now to be levied in the Court of Common Pleas. *Vide* stat. 1 W. 4, c. 70.

‡ If inconvenient, this may be omitted.

RELEASE IN FEE.

tended so to be, with their appurtenances, unto the said [*purchaser*] and his heirs, to the uses aforesaid, according to the true intent and meaning of these presents; *And also*, that it shall be lawful for the said [*purchaser*], his appointees, heirs, and assigns, at all times hereafter to enter into, and hold and enjoy, all the said hereditaments and premises hereby released, or intended so to be, and to receive and take the rents and profits thereof, to and for his and their own use and benefit, without any hindrance, disturbance, claim, or demand whatsoever, from or by the said [*vendor*], or his heirs (*l*), or any other person or persons lawfully or rightfully claiming through, under, or in trust for him (*m*) or them, or through, under, or in trust for the said [*vendor's father*], deceased, or by or through their or any of their acts, defaults, privity, consent, or procurement; *And also*, that the said hereditaments and premises hereby released, or intended so to be, now are free and clear of and from all estates, charges, and incumbrances whatsoever, made, occasioned, or suffered by him the said [*vendor*] (*n*), or by the said [*vendor's father*], deceased, or any person or persons claiming through, under, or in trust for them, or either of them, or by or through their or any of their acts, defaults, privity, consent, or procurement; *And moreover*, that he the said [*vendor*], and his heirs (*o*), and all other persons lawfully or rightfully claiming any estate, right, title, or interest, of, in, or to the said hereditaments and premises hereby released, or intended so to be, or any part thereof, through, under, or in trust for him (*p*) or them, or through, under, or in trust for the said [*vendor's father*], deceased, shall and will, from time to time, and at all times hereafter, upon the request and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, and execute all such further or other lawful

For quiet enjoyment.

Free from incumbrances.

And for further assurance.

(*l*) Add, if the wife joins—
" or the said [*wife*], his wife."

Variations where wife joins.

(*m*) " her."

(*n*) " or the said [*wife*], his wife."

(*o*) " and the said [*wife*], his wife."

(*p*) " her."

RELEASE IN FEE.

and reasonable acts, deeds, conveyances, and assurances for the more effectually conveying and assuring of the said hereditaments and premises, with their appurtenances, to the uses aforesaid, or to such other uses, and in such manner, as the said [*purchaser*], his appointees, heirs, or assigns shall direct, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel, shall be reasonably advised and required. IN WITNESS, &c.

ASSIGNMENT OF LEASEHOLDS.

ASSIGNMENT *of* LEASEHOLDS *by a* VENDOR *to a* PURCHASER. *(Variation where the Assignment is made by two* TENANTS *in* COMMON (*a*) *).*

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part: WHEREAS, by an indenture of lease, bearing date on or about the —— day of ——, made between [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part; the said [*lessor*] demised unto the said [*lessee*], his executors, administrators, and assigns, *All that* (*b*) *(describe parcels)*, with the appurtenances thereunto belonging, *To hold* the same unto the said [*lessee*], his executors, administrators, and assigns, *from the —— day of —— then last for the term of —— years then next ensuing, at the yearly rent of £——, payable quarterly, as therein mentioned, and subject to the observance and performance of certain covenants and conditions in the said indenture of lease expressed, and on the part of the lessee therein named

Recital of lease.

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(*a*) The variations throughout the precedent are referred to by the marks †, ‡, &c. Where the alteration was merely the substitution of the plural for the singular number of the word *vendor*, the variation has not been noticed.

(*b*) In assignments of leasehold interests, it is usual to describe the parcels in the recital of the deed creating the term. If the description has undergone any subsequent alteration, it should be stated, as in the recital added in the next note.

to be observed and performed. And whereas, by divers mesne assignments, or other assurances or means effectual in the law, the said leasehold premises became absolutely vested in the said [*vendor*] for all the residue of the said term of —— years granted by the said indenture of lease, for his own use and benefit (*c*). And whereas the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said leasehold premises, for all the residue of the said term of —— years, subject to the rent and covenants of the said indenture of lease, at the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*vendor*] at or immediately before the execution of these presents, the receipt whereof, and that the same is in full for the absolute purchase of the premises hereby assigned, he the said [*vendor*] doth † hereby acknowledge, and from the same doth ‡ release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, he the said [*vendor*] **Doth*, by these presents § grant, sell, assign, and transfer unto the said [*purchaser*], his executors, administrators, and assigns, *All and singular* the said —— and premises hereinbefore described (*d*); which said premises are now in the

ASSIGNMENT OF LEASEHOLDS.

—that lease has become vested in assignor.

—of contract for purchase.

Testatum.

In consideration of £—— assignor assigns to assignee.

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Parcels.

(*c*) If the assignment is made by the lessee, this recital of course will be omitted. If only one assignment has occurred since the granting of the lease, then, instead of the recital in the text, a short recital of the assignment may be introduced. Add, if the fact be so—

"And whereas the said [*vendor*] hath erected and built a messuage or dwelling-house, stable, and out-buildings on the said piece of ground and premises comprised in and demised by the hereinbefore recited indenture of lease."

That vendor has erected a messuage on the ground demised by the lease.

† "they the said [*vendors*] respectively do hereby," &c.

‡ "do."

§ "they the said [*vendors*] *Do*, and each of them *Doth*, by these presents, assign," &c.

(*d*) "together with the messuage or dwelling-house, stable, out-buildings, and offices erected and built thereon as aforesaid."

ASSIGNMENT OF LEASEHOLDS.

tenure or occupation of [*tenant*] as tenant to the said [*vendor*]; and all other the premises comprised in and demised by the hereinbefore recited indenture of lease; And all and singular the rights, members, and appurtenances to the said premises, or any part thereof, belonging or appertaining, or therewith usually held and enjoyed, together with the said indenture of lease, and the full and whole force, benefit, and effect thereof; *And* all the estate, right, title, interest, benefit, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*] † in, to, and out of the said premises, and every part thereof; TO HAVE AND TO HOLD the said ——, and other the premises hereby assigned, or intended so to be, unto the said [*purchaser*], his executors, administrators, and assigns, henceforth, for all the residue and remainder now to come and unexpired of the said term of —— years granted by the hereinbefore recited indenture of lease, and for all other the estate, term, and interest of him the said [*vendor*] in the said premises, or any part thereof; subject, nevertheless, to the payment of the rent, and the observance and performance of the covenants, conditions, and agreements reserved and contained by and in the hereinbefore recited indenture of lease, and which, on the part of the lessee, his executors, administrators, or assigns, ought henceforth to be paid, observed, and performed. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth (*e*) hereby covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, that not-

Habendum to the purchaser for the residue of the term, &c.

Covenants by vendor;

—that, notwith-

† "them the said [*vendors*] respectively."

Variation where covenants are by two tenants in common.

(*e*) "AND the said [*one vendor*], so far only as concerns one undivided moiety or equal half part of the —— and premises hereby assigned, or intended so to be, and the acts, deeds, and defaults of the said [*one vendor*], and of those claiming under him; and the said [*other vendor*], so far only as concerns the other undivided moiety or equal half part of the said —— and premises, and the acts, deeds, and defaults of the said [*other vendor*], and of those claiming under him, do hereby, for themselves respectively, and for their respective heirs, executors, and administrators, covenant, &c."

withstanding any act, deed, matter, or thing whatsoever, made or done, or permitted to be made or done to the contrary by the said [*vendor*], the hereinbefore recited indenture of lease of the —— day of —— is a good, valid, and subsisting lease in the law for the premises thereby demised, and is still in full force for all the residue now unexpired of the said term of —— years thereby granted; And that the yearly rent of £—— thereby reserved, and all the covenants, conditions, and agreements contained in the said indenture, and on the part of the said lessee, his executors, administrators, or assigns to be observed and performed, have been duly paid, observed, and performed, up to the day of the date of these presents; And that, notwithstanding any such act, deed, matter, or thing as aforesaid, the said [*vendor*]† now hath in himself good right and absolute authority by these presents to assign or otherwise assure the said —— and premises hereby assigned, or intended so to be, with the appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, for all the residue which is now unexpired of the said term of —— years, in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that, subject to the payment of the rent, and the observance and performance of the covenants, conditions, and agreements reserved and contained by and in the said indenture of lease, it shall be lawful *for the said [*purchaser*], his executors, administrators, and assigns, henceforth, at all times hereafter, during the continuance of the said term of —— years, peaceably and quietly to enter into and upon, and hold and enjoy the said premises, with the appurtenances, and to take the rents and profits thereof, to and for his and their own use, without any eviction, interruption, or denial whatsoever from or by the said [*vendor*]‡, or any person or persons whomsoever having, or rightfully claiming, or to claim any estate, right, title, or interest at law or in equity, in, to, or out of the same premises, or any

ASSIGNMENT OF LEASEHOLDS.

standing any act by him, lease is valid;

—and that he hath power to assign,

—and for quiet enjoyment,

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† "[*vendors*] now have in themselves, or one of them now hath, &c."

‡ "[*vendors*] respectively."

ASSIGNMENT OF LEASEHOLDS.
—free from incumbrances;

part thereof, from, through, under, or in trust for him†; *And also*, that the said premises are free and discharged, or by the said [*vendor*]‡, his heirs, executors, or administrators, will be effectually kept indemnified from and against all former estates, rights, titles, charges, and incumbrances whatsoever, at any time or times heretofore made, created, or occasioned by the said [*vendor*]§, or any person or persons claiming, or to claim, through, under, or in trust for him‖;

—and for further assurance.

And lastly, that the said [*vendor*], his†† executors or administrators, and every person whosoever having, or rightfully claiming, or to claim, any estate, right, title, or interest, at law or in equity, in, to, or out of the said premises, or any part thereof, through, under, or in trust for him or them‡‡ will, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his executors, administrators, or assigns, make,

[*486] do, or execute, and perfect *every such lawful and reasonable act, deed, assignment, or assurance in the law whatsoever, for more effectually or satisfactorily assigning or otherwise assuring the said premises hereby assigned, or intended so to be, with the appurtenances, unto the said [*purchaser*], his executors, administrators, or assigns, thenceforth for all the residue or remainder which shall be then unexpired of the said term of —— years, in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised and required, [so as such further assurances, or any of them, shall not contain in them, or imply, any other or more

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† " them or either of them."
‡ " [*vendors*] or one of them, their or one of their."
§ " [*vendors*], or either of them."
‖ " them respectively."
†† " [*vendors*] respectively, and their respective."
‡‡ " them respectively."

It is incorrect, where the vendor's covenants only extend to the acts of himself, and of persons claiming under *him*, to except the rent and covenants in the lease—at all events, if the covenantor be not the original lessee.

ASSIGNMENT OF LEASEHOLDS.

general covenant or warranty than against the acts, deeds, or defaults of the person or persons who shall be required to make or execute the same; and so as such person or persons shall not be compellable to go from his, her, or their usual place or places of abode] (*f*). And the said [*purchaser*], for himself, his heirs, executors, administrators, and assigns, *Doth* hereby covenant and agree with the said [*vendor*], his heirs, executors, and administrators, that the said [*purchaser*], his heirs, executors, administrators, or assigns, will, from time to time, duly pay the said rent of £——, and observe and perform the several covenants, conditions, and agreements reserved and contained by and in the hereinbefore recited indenture of lease of the —— day of ——, on the part of the lessee, his executors, administrators, or assigns, henceforth to be paid, observed, and performed; *And also*, that the said [*purchaser*], his heirs, executors, administrators, or assigns, will, from time to time, and at all times hereafter, effectually keep indemnified the said [*vendor*], his† heirs, executors, and administrators, from all actions, suits, and other proceedings which shall be commenced or prosecuted against the said [*vendor*], his‡ heirs, executors, or administrators; *and all costs, losses, damages, and expenses [*487] which he or they shall respectively incur or suffer by reason of the non-payment of the said rent, or the non-observance or non-performance of the said covenants, conditions, and agreements, or any of them, or by reason of any other matter or thing in anywise relating thereto (*g*). In witness, &c.

Covenant by purchaser to pay the rent, and perform the covenants of the lease.

(*f*) As to this *professed* qualification of the covenant, *vide ante*, p. 465.

† "[*vendors*] respectively, and their respective."

‡ "[*vendors*], or either of them, their, or either of their."

(*g*) Without any express stipulation, the purchaser of a leasehold estate is bound to enter into a covenant with the vendor to indemnify him against the rent and covenants of the lease; *Pember* v. *Mathew*, 1 B.C.C. 52; and it is immaterial whether the vendor stand in the situation of lessee or assignee; for though, in the latter case, he is only bound by the covenants during the continuance of his ownership, and is, therefore, discharged from his liability *to the lessor* by the assignment, yet it is probable that he has entered into a covenant with the person from whom he purchased, whether lessee or assignee, to pay the rent and perform the covenants; and against this covenant (from which he is not released by his assign-

Purchaser of leasehold bound to indemnify vendor from the rent and covenants.

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ment) he is entitled to an indemnity. And the circumstance, that the sale is made by an executor or administrator, from whom the purchaser can have no covenants of title, does not vary the rule. This point was decided in the case of *Staines* v. *Morris*, 1 Ves. & Bea. 8, the circumstances of which were as follow:—In 1793, a lease was granted to George Clarke, who, by deed-poll, in September, 1795, assigned it to Sir W. Staines, subject to the future rent and covenants. This deed, which was executed by Clarke only, contained a covenant on the part of Staines to pay the rent and perform the covenants, and indemnify Clarke therefrom. Sir W. Staines died, and his executors sold the estate by auction, describing themselves as executors. On a draft of the defendant's assignment being sent to the vendors' solicitor, he struck out all the covenants by them, except the covenant that they had done no act to incumber, and inserted a covenant by the purchaser to pay the rent and perform the covenants of the lease. The question now was, as to the propriety of these alterations.

Lord *Eldon*.—"The equity is clear, that he who takes an assignment of a term shall take it, giving a covenant of indemnity to the assignor against the payment of the rent and the performance of the covenants; and there is no distinction between the cases of assignment by the original lessee, and by an assignee of that original lessee; the propriety of enforcing that covenant being as manifest in the case of the assignee, that he may be indemnified in respect of his parting with the possession, out of which the duty to pay the rent accrues, independent of actual covenant, as in the case of assignment by the original lessee†. It is however said here, that, [*488] *as there is no covenant for the title, there can be no covenant for indemnity. I do not admit that. The purchaser, knowing he is not to have a covenant

† His Lordship here assumes, that the assignee, "parting with the possession," has himself entered into an express covenant of indemnity with his assignor, for the words "independent of actual covenant" refer to the case of an assignee *in possession*. Such an assignee, his Lordship evidently considered, would be responsible for breaches of covenant committed during the continuance of his possession, or, rather, according to the doctrine *now* established, of his *estate*, not only to the lessor, but also to his assignor, even without an express covenant, (a point which has been since decided in the case of *Burnett* v. *Lynch*, 5 Barn. & Cress. 589, *post*, 490). But, whether he would be liable to his assignor *after alienation*, by virtue of any implied contract resulting from the relation of assignor and assignee, is a point which has always been considered as very doubtful, and could hardly have been intended to be touched upon by the Lord Chancellor in these passing observations; as it was never his Lordship's habit to advance bold general propositions on doubtful points not judicially brought before him.

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for title, gives a price accordingly for the estate without such covenant. He buys the covenant of the original lessor, and the title which the executors of the lessee can give him, without the benefit of such a covenant as he would have had, if the original lessee had been lessor. Then, why is the assignor not to have a covenant against the rent? The purchaser knows that the title may, or may not, be disturbed; and if there is no covenant for indemnity against the rent, the consequence is, that the lessor, having the original lessee liable to pay the rent for the premises, deteriorated, perhaps, by fire, and the landlord not bound to rebuild, may, though he has the power, decline to evict for non-payment of rent, as the original lessee, though not the assignee, may be able to pay; and, if there is a mesne assignee, and the original lessee, on making over his title, has got an indemnity, why should not the mesne assignee recover from the assignee who has the possession, in respect of which such a covenant is entered into?"

Assignee of a bankrupt, not being liable to rent and covenants, not entitled to a covenant of indemnity.

The requisition of a covenant of indemnity, in general, can only be supported where the vendor is liable to be damnified by the non-performance of the covenants. If, therefore, the sale is by the assignee of a bankrupt, inasmuch as such assignee is not liable to the covenants of the lease after assignment, nor to any covenant of indemnity the bankrupt may have entered into, he cannot exact a covenant of indemnity from the purchaser; and, it seems, he has no right as against the purchaser, without express stipulation, to require, and he ought not, as against the creditors, to prejudice the sale by stipulating for, an indemnity to the bankrupt against any risk *he* may continue to be exposed to. Thus, in the case of *Wilkins* v. *Fry*, 1 Mer. 244, where B. and D., having taken leases of certain property, assigned them to the defendants as a security for money advanced, and became bankrupts. The assignees entered into a contract with the defendants for the sale of their interest in the leases, (with other property), *in consideration of 8,000*l.*, and agreed to execute such deeds as should [*489] be required by the purchasers for carrying the contract into effect. This contract was confirmed by the creditors. The purchasers declined taking an assignment, being content to rest their title to the equity of redemption on the agreement alone. But one of the assignees filed a bill against them, praying a specific performance of the contract, and that the defendants should accept an assignment, containing such covenants on their part, as, with reference to the interest of the plaintiff and his co-assignees, and of the bankrupts, might be reasonably required for their indemnity. The purchasers denied the right of the assignees to call upon them to enter into any covenants, or take an assignment at all; and Sir *W. Grant*, M.R., decided that their objection was well founded. His Honour, after admitting the general doctrine, that a lessee, who carries his lease to market, is entitled to expect that the vendee, who is to be invested with the beneficial interest, should take upon himself the burthen, proceeded to shew

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that the case was different with respect to assignees in bankruptcy; who do not obtain the property of a bankrupt by any contract between them and the bankrupt; but take it by the operation of law, and enter into no covenants to indemnify the bankrupt against the covenants in his leases; they might waive the leases, or take to them subject only to such liability as attached upon all assignees, *i. e.* during the time they retain that character. And that, supposing it were otherwise with regard to assignees in general, yet these assignees never were at any moment liable to be sued upon any one of the covenants in the lease, as they took nothing from the bankrupt but a mere equity of redemption; for he himself had, before his bankruptcy, assigned away the whole legal estate. "If, then," continued his Honour, "the assignees themselves do not need, and cannot require, a covenant for their own protection, can they insist upon such a covenant for [*490] the *protection of the bankrupt? I must again here repeat what I before said, that the assignees do not take from the bankrupt his property by virtue of any contract, but by the operation of a positive law. The rights and obligations implied in a transaction between two parties dealing upon an equal footing with each other, cannot come in question in such a case as this. The bankrupt has no right to prescribe any terms upon which he will part with his property. It is wrested from him for the benefit of his creditors, and is to be applied to the best advantage, for the purpose of paying their debts. The assignees take a beneficial interest in the lease, while the bankrupt himself continues burthened with all the covenants†. This is clearly the case so long as the assignees themselves continue in possession of the lease, because they may use the lease to the best advantage; and the bankrupt, in the mean time, has no covenant of indemnity whatsoever. Now, can his situation be altered, or can a new right accrue to him merely because the assignees, instead of themselves enjoying the benefit of the lease, choose to carry that lease to market, and to make profit of it in the shape of sale, instead of in the shape of enjoyment? What right accrues to the bankrupt from that use which they make of his property? What is it that they offer to sell? The same beneficial lease which they themselves have. They have a beneficial lease to sell; and can they say to the purchaser, it is not that beneficial lease which you have bought, but you have bought a less beneficial lease than that which we had to sell; you have bought from us a lease clogged with covenants and conditions which considerably reduce the value of that lease? For, undoubtedly, a lease, with respect to which a man is obliged to enter into covenants which will at all times bind himself, whether the lease remains of value or becomes of no value, will fetch less than a lease [not] clogged with any such covenants. Unless there be an actual stipulation for the purpose, how can a purchaser understand that he is buying any thing ex-

† This was before the late general bankrupt act of 6 Geo. 4, c. 16.

cept the estate as it stands vested in the assignee? How can he understand he is to take it in any other plight? But I very much doubt whether assignees, who are mere trustees for creditors, would be justified in annexing any such stipulation to the sale of a lease; for, as I have already said, it would reduce the value of the lease; and can assignees, for the benefit of the bankrupt, diminish the value of that property, of which they have all the management for the benefit of the creditors? I apprehend that they cannot."

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The same precise point in regard to the bankrupt cannot now arise, as the late bankrupt act exempts a bankrupt lessee from the covenants in the lease after its acceptance by the assignees; (*vide ante*, Vol. 4, p. 389); but *as the act does not exonerate a bankrupt from covenants of indemnity entered into by him as assignee of a lease, a case may yet exist, calling for the application of the principle. The result is, to give to purchasers of leaseholds from assignees of bankrupts an advantage of no small value, and which, let it be observed, is not confined to the immediate purchaser under the bankruptcy, but extends to all subsequent assignees of the lease; for, when once an assignment is made by a person who is under no liability extending beyond his ownership, of course an indemnity from the assignee cannot be required. By parity of reasoning, the latter, on his parting with *his* interest, would be in a similar situation, and thus the necessity for any further security from assignee to assignor is at an end.

Remarks upon *Wilkins* v. *Fry*.

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Advantage of purchasing leaseholds from assignees in bankruptcy.

Where it is intended that the purchaser of the lease shall not contract any positive engagement to pay the rent and perform the covenants, the assignment should not be declared to be made subject to such an obligation, since expressions to this effect (usually introduced into the *habendum*) have been held to amount to an express covenant. Thus, where A., lessee of a term of years, sold the property for a pecuniary consideration to B., on which occasion A. and B. executed an indenture, by which the premises were assigned by A. to B. for the residue of the term, *subject to the payment of the rent and performance of the covenants reserved and contained in the lease;* B. subsequently sold and assigned the term to C., who neglecting to pay the rent, the same was paid by A. the lessee, who thereupon brought an action of covenant against B., his assignee, and was held to be entitled to recover, on the ground that the words in question imported an engagement by the defendant, (the assignee), to perform all the covenants and agreements reserved and contained in the original lease. *Steward* v. *Wolveridge*, 2 Moore & Scott, 75. And even where the assignee of a lease has not entered into an express covenant, he is bound to indemnify the assignor against breaches of covenant committed while the estate continues vested in him as assignee, if such be the tenor of the instrument under which his title is derived. Thus, where on the sale of a leasehold property the vendor (who was the original lessee) by deed poll assigned the term to the purchaser, subject to the payment of the rent, and the performance of the covenants reserved

Words in the *habendum* "subject to the rent and covenants," held to create a covenant.

Assignee bound to pay rent and perform covenants during his ownership.

ASSIGNMENT OF LEASEHOLDS.

and contained in the lease; the purchaser entered, and during his ownership the lessee was obliged by the lessor to pay damages for a breach of covenant. The present was an action on the case by the lessee against his assignee, and it was held by the Court that the action was well brought. Lord *Tenterden*, C. J., said, "I think an action of covenant is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained, except against a person who by himself, or some other person acting on his behalf, has executed a deed under seal; or who (under some very peculiar circumstances, such as those mentioned in Co. Litt. 231. a.) has agreed by deed to do a certain thing. Here, the defendant has not engaged by deed to perform the covenants, and consequently covenant will not lie. Then, will an action of *assumpsit* lie? I think it would—but why? Because the defendant has, by taking the estate subject to the payment of the rent, and the performance of the covenants in the original lease, thereby made it his duty to pay the rent and perform the covenants; and if by neglecting that duty a burden is cast upon the person from whom he took the estate, it seems to me that the law will imply a promise as arising out of that duty, and in that case the action of *assumpsit* will lie; but it by no means follows that, because a promise may be implied by law, this action on the case, which is in terms founded on the breach of that duty from which the law implies a promise, may not also be maintainable. I think that a duty did arise when the defendant accepted the assignment of the lease, subject to the performance of the covenants; and that, as a breach of that duty has been committed, a special action on the case may be maintained." *Burnett* v. *Lynch*, 5 Barn. & Cress. 589.

The doctrine of this case, it will be observed, does not supersede the necessity of an express covenant by an assignee to pay the rent and perform the covenants; because it seems to be the better opinion, that the assignee's liability, incident to the implied contract, is confined to the period of his ownership.

ASSIGNMENT *of* PART *of the* PREMISES *comprised in a* LEASE *(the Remainder being retained by the Vendor);* MUTUAL COVENANTS *by Vendor and Purchaser to* PAY *their respective* PROPORTIONS *of* RENT, *&c.* (*a*)*; by Vendor to* PRODUCE LEASE; *by Purchaser* NOT *to* ERECT BUILDINGS.

ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part: WHEREAS *(recite lease of a messuage and two stables, ut ante,* p. 481*)*: AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said two stables, (being part of the premises comprised in the said indenture of lease), for the residue of the said term, at or for the price or sum of £——; and upon the treaty for the said purchase it was agreed, that the said [*purchaser*], his executors, administrators, and assigns should pay the yearly rent of £——, in respect of the said two stables, as his proportion of the said yearly rent of £——, and that the residue of the said yearly rent of £—— should be paid by the said [*vendor*], his executors, administrators, and assigns, in respect of the said demised dwelling-house and premises not intended to be hereby assigned, and that the said parties should enter into

Parties.

Recital of lease.

— of contract for purchase.

(*a*) This precedent does not go on to give cross powers of distress, which is the most efficient mode of carrying into effect an arrangement of this nature; but which is frequently effected by a separate deed, of which a precedent has already been given. (*Vide* Vol. 4, p. 290; see also observations, *ante*, p. 406). If it be deemed advisable to insert such powers in the present deed, the precedent referred to will furnish the requisite information. It might be convenient for the purchaser, that his power of distress should be inserted in the present deed, as it would render a further instrument unnecessary; but if it also contains the assignor's power of distress, a counterpart of the deed should be delivered to him. In the present case, also, the assignor ought to have a counterpart.

ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

Testatum. In consideration of a sum of money,

the several covenants and agreements hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*vendor*], at or before the execution of these presents, the receipt of which said sum of £—— he the said [*vendor*] doth hereby acknowledge, and of and from the same doth hereby acquit, release, and for ever discharge the said [*purchaser*], his executors, administrators, and assigns, He the said [*vendor*] *Doth* by these presents grant, bargain, sell, assign, and set over, unto the said [*purchaser*], his executors, administrators, and assigns, ALL THOSE the said two stables hereinbefore described, and comprised in and demised by the hereinbefore recited indenture of lease, with their appurtenances, and which said premises are now in the occupation of the said [*purchaser*] (*c*); Together with all the benefit and advantage of the said indenture of lease, and of the lessor's covenants therein contained, so far as the same relate to or concern the said two stables and premises hereby assigned (*d*): *And* all the estate, right, title, interest, term of years to come or unexpired, benefit of renewal, property, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*], in and to the said two stables and premises hereby assigned; TO HAVE AND TO HOLD the said two stables, and all and singular other the premises hereby assigned, or intended so to be, with their [*494] *appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, henceforth, during all the residue and remainder now to come and unexpired of the said term of —— years in and by the said indenture of lease granted, and for all other the estate, term, and interest of the said [*vendor*] therein: subject, nevertheless, to the pay-

vendor assigns.

Premises.

General words.

Habendum.

Subject to pro-

(*c*) If an underlease has been granted by the vendor, it should be noticed here, and the benefit of the covenants, and the counterpart, should be granted in the usual manner. It should also be excepted out of the covenant against incumbrances, &c.

(*d*) If there has been an underlease, add—

"and the whole and exclusive benefit of the said underlease."

ment of the said yearly rent of £—— quarterly to the said [*lessor*], his heirs or assigns, on the days and times, and in the manner in which the whole rent reserved by the said indenture of lease is made payable; and also subject to the covenants, conditions, and agreements contained in the said indenture of lease, and which, so far only as relate to the said two stables and premises hereby assigned, with their appurtenances, are and ought henceforth (*e*) to be observed and performed; And the said [*vendor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his executors, administrators, and assigns, in manner following, that is to say, That, notwithstanding any act, deed, matter, or thing, made, done, or committed to the contrary by him the said [*vendor*], the said indenture of lease, at the time of the execution of these presents, is a good and effectual lease, valid in the law, of and for the said two stables and premises hereby assigned, with their appurtenances, for the term thereby demised, and is in nowise surrendered, forfeited, or become void or voidable; And that the rent in or by the said indenture of lease reserved, and the land tax, sewers' rate, and all other taxes, rates, and assessments whatsoever, chargeable upon the tenant or lessee of the said two stables and premises hereby assigned, have been well and truly paid and discharged up to and inclusively of the day of the date hereof (*f*); And that the covenants and agreements contained in the said indenture of lease, *on the part of the tenant or lessee, have been well and truly observed and performed up to and inclusively of the date of these presents (*g*); *And also*, that he the said [*vendor*], his execu-

ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

portion of rents and covenants.

Covenants by vendor:

—that the lease is valid;

—that rent and taxes have been paid,

and covenants performed;

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—that vendor

(*e*) *Or* "from the —— day of —— last."
Or "from the —— day of —— next."

(*f*) *Or* "the said —— day of —— last."
Or "shall be well and truly paid and discharged by him the said [*vendor*], his executors, administrators, or assigns, up to and inclusively of the said —— day of —— next."

(*g*) *Or* "the said —— day of —— last."
Or "shall be well and truly observed and performed up to and inclusively of the said —— day of —— next."

ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

will pay apportioned rent,

tors, administrators, or assigns, shall and will henceforth, and at all times hereafter (*h*), well and truly pay the said yearly rent of £—— [*vendor's proportion of rent*], so agreed to be paid by him and them in respect of the said demised dwelling-house and premises not hereby assigned as aforesaid, and also well and truly perform and observe the covenants, conditions, and agreements in the said indenture of lease contained on the part of the tenant or lessee to be performed and observed, so far only as the same relate to the said dwelling-house and premises; *And also* that he the said [*vendor*], his heirs, executors, or administrators shall or will effectually save harmless and keep indemnified the said [*purchaser*], his heirs, executors, administrators, and assigns, of and from all evictions, ejectments, distresses, suits at law and in equity, costs, losses, charges, damages, and expenses whatsoever, by reason of the non-payment of the said rent of £——, or the non-performance of all, any, or either of the covenants, conditions, and agreements contained in the said indenture of lease, so far as the same covenants, conditions, and agreements relate to or concern the messuage and premises comprised in the same indenture of lease, and not hereby assigned as aforesaid; *And also*, that he the said [*vendor*], his executors, administrators, or assigns, shall and will, from time to time, and at all times hereafter, unless prevented by fire or any other inevitable accident, upon every reasonable request, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, produce and shew forth to the said [*purchaser*], his executors, administrators, or assigns, or to such person or

and indemnify purchaser therefrom;

and produce lease.

[*496] *persons as he or they shall direct, as occasion shall require, the hereinbefore recited indenture of lease; And also shall and will, at the like request and costs, deliver to him or them a copy or abstract of the same indenture, or of any part or parts thereof, for the manifestation or support of the title or possession of the said [*purchaser*], his executors, administrators, and assigns, of, in, or to all or any part of the said

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(*h*) *Or* "from the —— day of —— next."

Or "from the —— day of —— last, and at all times thereafter."

two stables and premises hereby assigned; and, if required, shall and will permit such copy or abstract to be examined with the original; *And that*, notwithstanding any such act, deed, matter, or thing as aforesaid, he the said [*vendor*] now hath in himself good right, full power, and lawful and absolute authority to assign or otherwise assure the said two stables and premises hereby assigned, or intended so to be, unto the said [*purchaser*], his executors, administrators, and assigns, during the residue now unexpired of the said term of —— years, in manner aforesaid, and according to the true intent and meaning of these presents; *And further*, that he the said [*purchaser*], his executors, administrators, and assigns, shall, or lawfully may, from time to time and at all times hereafter, during the residue and remainder of the said term of —— years granted by the said recited indenture of lease, peaceably and quietly hold, occupy, possess, and enjoy the said two stables and premises hereby assigned, and receive and take to his and their own use and benefit the rents and profits thereof, without any interruption or denial from or by the said [*vendor*], his executors or administrators; *And that*, free and clear, and freely and clearly discharged, or by him the said [*vendor*], his heirs, executors, or administrators effectually kept indemnified, of, from, and against all manner of incumbrances whatsoever, made, *created, or suffered by the said [*vendor*], his executors or administrators, or any other person or persons lawfully claiming by, from, through, under, or in trust for him or them; *And moreover* that he the said [*vendor*], and his executors and administrators, and all persons whosoever, lawfully claiming by, from, through, under, or in trust for him or them, shall and will, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his executors, administrators, or assigns, make, do, and execute, or cause to be made,done, and executed, all such further acts, deeds, assignments, and assurances in the law whatsoever, for the more effectually assigning or otherwise assuring the said two stables and premises hereby assigned, or intended so to be, unto the said [*purchaser*], his executors, administrators, and assigns, during all the residue which shall be then unexpired of the said term of —— years, according to the

ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

—that vendor has good right to assign;

—for peaceable enjoyment;

— free from incumbrances.

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For further assurance.

ASSIGNMENT OF PART OF THE PREMISES COMPRISED IN A LEASE.

Covenant by the purchaser to pay and perform his proportion of the rent and covenants;

true intent and meaning of these presents, as by the said [*purchaser*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised and required. And the said [*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*vendor*], his heirs, executors, and administrators, in manner following, (that is to say), that he the said [*purchaser*], his executors, administrators, or assigns shall and will, from time to time, and at all times hereafter (*i*), well and truly pay the said yearly rent of £——, so agreed to be paid by him and them in respect of the said two stables and premises hereby assigned as aforesaid; And also well and truly perform and observe the covenants, conditions, and agreements in the said indenture of lease contained on the part of the tenant or lessee to be performed and observed, so far only as the *same relate to the said two stables and premises hereby assigned; And also, that the said [*purchaser*], his executors, administrators, or assigns, shall and will, from time to time, and at all times hereafter, effectually save harmless and keep indemnified the said [*vendor*], his heirs, executors, and administrators, of and from all evictions, ejectments, suits at law and in equity, distresses, costs, losses, charges, damages, and expenses whatsoever, by reason of the non-payment of the said rent of £——, or of the non-performance of all, any, or either of the said covenants, conditions, and agreements relating to the said hereby assigned premises as aforesaid; *And also* that he the said [*purchaser*], his executors, administrators, or assigns shall not nor will at any time hereafter, during the residue of the said term of —— years, make, erect, or set up any buildings, wall, partitions, or other erections on the premises hereby assigned, so as to obstruct or diminish the light or air of the said demised dwelling-house and premises not hereby assigned, as the same light and air are now enjoyed by the occupiers thereof, or so as to raise the height or to widen the ground plan of the said two stables hereby assigned, or intended so to be, or any part thereof. In witness, &c.

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and to indemnify the vendor therefrom;

Not to erect buildings so as to obstruct the light of the assignor's dwelling-house.

(*i*) *Or* "from the said —— day of —— last."
Or "from the said —— day of —— next."

ASSIGNMENT *of a* LEASE *with the* CONSENT *of the* LESSORS, *where the* ASSIGNEE COVENANTS *with the* LESSORS *to pay the* RENTS, *and* PERFORM *the* COVENANTS; *with a* REVIVAL *of the* CONDITION *for Re-entry on Breach of* COVENANTS, *which was waived by the License* (*a*). (*Variation where the* CONSIDERATION *for the Assignment is the* TRANSFER *of* STOCK (*b*).

ASSIGNMENT OF LEASEHOLD, WITH CONSENT OF LESSOR.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; the master, wardens, *and society of the mystery of Bowyers, of the city of London, of the second part; and [*purchaser*], of &c., of the third part: WHEREAS, by indenture, bearing date on or about the —— day of ——, and made between the master, wardens, and society of the mystery of Bowyers, of the one part; and the said [*vendor*], of the other part; the said master, wardens, and society did demise and lease unto the said [*vendor*], his executors and administrators, ALL THAT,

Parties.

[*499]

Recital of lease.

(*a*) As to this doctrine, *vide ante*, Vol. 4, pp. 55, 366.

(*b*) If this variation is adopted, the deed will be liable only to a common deed stamp of 1*l.* 15*s.* It is remarkable that the Stamp Act, 55 Geo. 3, c. 184, (*vide post*, Vol. 8, p. 384) has not charged with *ad valorem* duty conveyances on sales in consideration of stock; by the acceptance of which, therefore, instead of money, the duty is avoided. In fact the deed operates merely in the nature of an exchange, the estate being conveyed in consideration of the stock being transferred; and though the latter happens to be always convertible into money at the market price of the day, yet this does not change its character of being something different from money, as is shewn, if evidence be wanting, by the late case of *Cumberland* v. *Kelley*, 3 Barn. & Adolph. 607, where it was held that a grant of an annuity, in consideration of a transfer of stock in the funds, did not require enrolment under the stat. 17 Geo. 3, c. 26, which extended only to annuities granted for a pecuniary consideration, and not (as the subsequent stat. of 53 Geo. 3, c. 141, now in force) to annuities in consideration of money, or *money's worth*.

Ad valorem duty not payable in respect of a stock consideration.

ASSIGNMENT OF LEASEHOLD, WITH CONSENT OF LESSOR.

&c., *(describe parcels)*: *To hold* the same, with their appurtenances, unto the said [*vendor*], his executors, administrators, and assigns, from —— the —— day of —— then next, for the term of twenty-one years thence ensuing, at and under the yearly rent of £——, payable quarterly, as therein mentioned; And also, at and under the further yearly rent or sum of £—— an acre, and so in proportion for any less quantity of grass ground, which the said [*vendor*], his executors, administrators, or assigns, should plough, or convert into tillage; and subject to the several covenants therein contained on the part of the said [*vendor*], his executors, administrators, and assigns, to be performed; and

— of covenant not to assign or underlet.

in particular, subject to a covenant that he the said [*vendor*], his executors, administrators, or assigns, should not nor would at any time or times, during the said term thereby granted, demise, assign, or dispose of the said thereby demised premises, or any part thereof, nor part with the possession of the same, for all or any part of the said term thereby granted, to any person or persons whomsoever, without the consent of the said master, wardens, and society, or their successors, in writing, under their common and usual seal, first obtained. *(Recite contract for purchase)* (*c*). AND WHEREAS the said [*vendor*] hath applied to and requested the said master, wardens, and society of the mystery of Bowyers, to grant unto him their license and consent under their common and usual seal, to assign the said premises for all the residue of the said term of twenty-one years, unto the said [*purchaser*], which they have consented to do, on the said [*purchaser*] executing to them such covenant and grant as are hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the *premises, and also

— of contract for purchase, and agreement of lessors to grant license.

Testatum.

(*c*) If the consideration is the transfer of stock, substitute for the recital of the contract for sale, the following:—

Variation where the consideration is the transfer of stock.

"AND WHEREAS the said [*vendor*] hath contracted with the said [*purchaser*] to assign to him the said leasehold —— and premises in consideration of £—— 3*l. per cent.* consolidated annuities being transferred by the said [*vendor*] to the said [*purchaser*]."

ASSIGNMENT OF LEASEHOLD, WITH CONSENT OF LESSOR.

In consideration of the sum of £—— of &c., paid &c., the receipt &c., (*d*) he, the said [*vendor*], by and with the license and consent of the said master, wardens, and society of the mystery of Bowyers, (testified by this deed or writing under their common or usual seal), *Doth* by these presents bargain, sell, assign, and transfer unto the said [*purchaser*], his executors, administrators, and assigns, *All* and singular the said —— and premises hereinbefore described, and all other the premises demised by the said recited indenture of lease of the —— day of ——, as aforesaid, with their appurtenances; *And* all the estate, &c.: To HAVE AND TO HOLD the said —— and other the premises hereinbefore expressed to be hereby assigned, with their appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, henceforth during all the residue now unexpired of the said term of twenty-one years, granted by the said recited indenture of lease as aforesaid, and for all other the term of the said [*vendor*] therein; subject to the payment of the said yearly rents, and to the performance of the covenants in the said indenture of lease contained, and which, on the part of the said [*vendor*], his executors, administrators, and assigns, are or ought, from the —— day of —— last, to be paid and performed: And the said [*purchaser*] for himself, his heirs, executors, and administrators, doth hereby covenant with the said master, wardens, and society, their successors and assigns, that he the said [*purchaser*], his executors, administrators, or assigns, shall not nor will, at any time or times during the said term granted by the said recited indenture, demise, assign, or dispose of

In consideration, &c., vendor, with the consent of the lessors, assigns the premises to the purchaser.

Habendum.

Purchaser covenants with the lessors not to assign, &c.

(*d*) If the consideration is stock, say—

"In consideration of the said £—— 3*l. per cent.* consolidated annuities transferred by the said [*vendor*] to the said [*purchaser*] in the books of the Governor and Company of the Bank of England, at or immediately before the execution of these presents, the transfer of which said £—— 3*l. per cent.* annuities the said [*vendor*] doth hereby acknowledge, and therefrom doth acquit and discharge the said [*purchaser*], his heirs, executors, and administrators."

Variation where the consideration is the transfer of stock.

ASSIGNMENT OF LEASEHOLD, WITH CONSENT OF LESSOR.

the premises demised by the said indenture of lease, or any part thereof, nor part with the possession of all or any part or parcel of the same premises, for all or any part of the aforesaid term of twenty-one years, unto any person or persons whomsoever, without the license and consent of the said master, wardens, and society, or their successors, in writing, under their common and usual seal, first had and obtained; *And also,* that he the said [*purchaser*], his executors, administrators, or assigns, shall and will from time to time, during the residue now unexpired of the said term *hereby assigned, well and truly observe and perform all and singular other the covenants contained in the said recited indenture of lease on the part of the said [*vendor*], his executors, administrators, or assigns to be observed and performed: (*Covenant by the vendor for the title,* ut ante, p. 484: *covenant by the assignee to pay rents, &c.,* ut ante, p. 486:) *Provided always,* and it is hereby declared and agreed, and particularly the said [*purchaser*] doth hereby grant and declare unto the said master, wardens, and society, their successors and assigns, that if it shall happen that the said yearly rent or sum of £——, or any part thereof, or the said additional or increased rent, (in case the same additional or increased rent shall ever become payable), or any part thereof, shall be unpaid in the whole or in part by the space of twenty-one days next over or after any or either of the said days or times on which the same are respectively reserved and made payable in and by the said recited indenture of lease, or if the said [*purchaser*], his executors, administrators, or assigns, shall at any time or times during the said term hereby assigned, demise, assign, or dispose of the said hereby assigned premises, or any part thereof, or part with the possession of all or any part of the same premises, for all or any part of the said term hereby assigned, unto any person or persons whomsoever, without the license and consent of the said master, wardens, and society, or their successors, in writing, under their common seal, first had and obtained: or (*e*) if the said [*purchaser*], his exe-

And to perform the covenants.

[*501]

Proviso for re-entry on non-payment of rent, or on assigning, or on breach of covenants.

Principle of the doctrine of

(*e*) The license to assign, it is commonly thought, dispenses with the condition as to *all* the covenants; but no case has gone so far: and the

cutors, administrators, or assigns, shall not nor do in all things well and truly perform and observe all and every the covenants and conditions in the said recited indenture of lease contained, on the part of the said [*vendor*], his executors, administrators, and assigns, *to be performed and observed, according to the true intent and meaning of the same indenture of lease; Then, and in every or any of the said cases, it shall be lawful for the said master, wardens, and society, their successors and assigns, into and upon the said hereby assigned premises, or any part thereof in the name of the whole, wholly to re-enter, and the same and every part thereof, with the appurtenances, to re-possess and enjoy as in their former estate, any thing herein contained to the contrary notwithstanding. In witness, &c.

ASSIGNMENT OF LEASEHOLD, WITH CONSENT OF LESSOR.

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objection which has been shewn to exist to the doctrine of *Dumpor's* case may produce a doubt whether it would be carried beyond the strict letter of the authorities, *i. e.* as vacating the proviso against assignment. *Vide ante*, Vol. 4, p. 59, 2nd ed.

Dumpor's case questioned.

SURRENDER *by* Vendor *to* Purchaser, *out of Court, of* Copyhold.

SURRENDER OF COPYHOLD OUT OF COURT.

THE manor of ——, in the county of ——. BE IT REMEMBERED, that, on the —— day of ——, in the year of our Lord ——, [*vendor*], of &c., gentleman (*a*), one of the customary tenants of the manor aforesaid, came before [*steward*], of &c., esquire, steward of the said manor, and, in consideration of the sum of £—— to him the said [*vendor*] paid by the said [*purchaser*] of &c., did, out of court, surrender into the hands of the lord of the said manor, by the rod, by the hands and acceptance of the said steward, according to the custom of the same ma-

(*b*) If the vendor's wife is a party, vary the precedent, *ut ante*, Vol. 5, p. 358.

SURRENDER OF COPYHOLD OUT OF COURT.

nor, ALL THAT copyhold messuage, &c., *(describe parcels)*, with the appurtenances to the said premises belonging; and of which said premises the said [*vendor*] was admitted tenant at a general court held for the said manor on the —— day of ——; And the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; And all the estate, right, title, interest, trust, property, claim, and demand whatsoever, of the said [*vendor*], in, to, and out of the said premises; TO THE USE and behoof of the [*503] said [*purchaser*], his heirs *and assigns for ever, at the will of the lord, according to the custom of the said manor.

(Signed) [*Vendor*].

This surrender was accepted and taken the day and year above written, by me and before me.

[*Steward*], Steward of the Manor.

DEED ACCOMPANYING SURRENDER OF COPYHOLD.

DEED CONTAINING COVENANTS *of* TITLE (*a*), *(to accompany the last Precedent)*.

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—: BETWEEN [*vendor*], of &c., of

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As to deeds of covenant accompanying surrenders of copyholds.

(*a*) As no covenants are inserted on the court rolls, the vendor of copyholds frequently executes a contemporaneous deed containing such covenants; which only requires the common deed stamp, the *ad valorem* duty being upon the surrender. The practice of taking such covenants has only prevailed of late years, and now it is not often done, unless where the purchase is considerable. Indeed, the advantage which a copyholder has of ascertaining the state of the title, by an examination of the court rolls, more than counterbalances any security to be derived from covenants for title. One observation, which occurs respecting such deeds of covenant, is, that the possession of them is *primâ facie* an evidence of unincumbered ownership, which does not belong to the custody of copies of court roll, as the latter may always be obtained of the steward upon application,

the one part; and [*purchaser*], of &c., of the other part: WHEREAS the said [*purchaser*] lately contracted with the said [*vendor*] for the absolute purchase of the copyhold —— and hereditaments hereinafter described, held of the manor of ——, in the county of ——, and the inheritance thereof in fee-simple, at or for the price or sum of £——, which sum hath, immediately before the execution of these presents, been duly paid by the said [*purchaser*] to the said [*vendor*], the receipt of which said sum he the said [*vendor*] doth hereby acknowledge, and therefrom doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns: AND WHEREAS, for the purpose of carrying into effect the said contract, the said [*vendor*] hath this day, in consideration of the said sum of £—— paid to him by the said [*purchaser*] as aforesaid, surrendered, out of court, into the hands of the lord of the said manor, by the acceptance of [*steward*], of &c., esquire, steward of the manor, according to the custom thereof, ALL THAT *(describe parcels)*, TO THE USE of the said [*purchaser*], his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor, at and under the rents and services therefore due and of right accustomed: AND WHEREAS, on the treaty for the said purchase, it was agreed that the said [*vendor*] should enter into the covenants hereinafter contained for the title, quiet enjoyment, and further assurance of the said copyhold hereditaments and premises so surrendered as aforesaid: NOW

DEED ACCOMPANYING SURRENDER OF COPYHOLD.

Recital of contract for purchase.

— of surrender out of Court.

— of agreement to execute present deed.

Testatum.

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though a deposit of them has been held to create an equitable mortgage. *Vide ante*, Vol. 5, p. 462.

Sometimes, instead of making a surrender and entering into a deed of covenants, in which the surrender is treated as actually made, the vendor enters into a covenant to surrender, and covenants for the title by the same deed (as in the next precedent); but this is only another mode of effecting the same object, as the surrender is usually made at the same time. Of course, the purchaser will see that the surrender is perfected before he pays his money, as a mere covenant to surrender would give an equitable title only, attended with the danger incident to such titles; for the vendor might immediately afterwards surrender to another purchaser, who, if he had no notice, could not be deprived by the covenantee-purchaser of the benefit of his legal title. *Vide ante*, Vol. 5, p. 352.

DEED ACCOMPANYING SURRENDER OF COPYHOLD.

THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, he the said [*vendor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, in manner following, (that is to say), That, notwithstanding any act, deed, matter, or thing whatsoever, made, done, or committed, or knowingly suffered to the contrary by the said [*vendor*], he the said [*vendor*], at the time of surrendering the said copyhold ——, hereditaments, and premises, in the manner aforesaid, had in *himself full power and lawful and absolute authority to surrender the same, with the appurtenances, *To the use* of the said [*purchaser*], his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor, and the true intent and meaning of the said recited surrender: *And also*, that it shall be lawful for the said [*purchaser*], his heirs and assigns, from time to time, and at all times hereafter, under and subject to the rents and services due and of right accustomed for the said copyhold premises, according to the custom of the said manor, to enter into and upon, hold and enjoy the said copyhold ——, hereditaments, and premises so surrendered as aforesaid, or intended so to be, with the appurtenances; and to receive and take the rents and profits thereof, without any eviction, interruption, or denial whatsoever, of, from, or by him the said [*vendor*], or his heirs, or any other person or persons whomsoever, lawfully claiming any estate, right, title, trust, or interest in or to the same hereditaments and premises, by, from, through, under, or in trust for him or them: *And that* free and clear, and freely and clearly exonerated and discharged, or otherwise by him the said [*vendor*], his heirs, executors, or administrators, effectually saved harmless and kept indemnified from and against all and all manner of former and other estates, titles, charges, and incumbrances whatsoever, at any time or times heretofore, and to be at any time or times hereafter, committed, occasioned, or suffered by the said [*vendor*], or his heirs, or any person or persons lawfully claiming any estate, right, title, or interest in or to the said hereditaments and premises, by, from, through, under, or in trust for him or them, or by his, their, or any of their acts, deeds, means,

Vendor covenants with purchaser,

That, notwithstanding, &c., he had good right to surrender.

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—for quiet enjoyment.

— free from incumbrances.

default, or procurement (*b*); *And moreover*, that he the said [*vendor*] and his heirs, and all persons whosoever lawfully claiming any estate, right, title, or interest in or to the said hereditaments and premises, by, from, through, under, or in trust for him or *them, shall and will from time to time, and at all times hereafter, upon the request, and at the costs and charges of the said [*purchaser*], his heirs or assigns, make, do, execute, and perfect all such further and other lawful acts, deeds, surrenders, conveyances, and assurances in the law whatsoever, for the more effectually surrendering, or otherwise assuring, the said copyhold ——, hereditaments, and premises, to the use of the said [*purchaser*], his heirs and assigns for ever, or as he or they shall direct, according to the true intent and meaning of the said recited surrender; as by the said [*purchaser*], his heirs and assigns, or his or their counsel in the law, shall be reasonably devised or advised and required; so as no such further assurance shall contain or imply any other covenant or warranty on the part of the person or persons who shall be requested to execute the same, than for the acts, deeds, and defaults of himself, herself, and themselves respectively, and his, her, and their heirs, executors, and administrators; [And so as such person or persons shall not be compelled or compellable to go or travel from his, her, or their usual place or respective places of abode]. IN WITNESS, &c.

DEED ACCOMPANYING SURRENDER OF COPYHOLD.

—and for further assurance.

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(*b*) It is incorrect, in this place, to except the manorial rents and services, which, not being created by the act of the vendor, are not within the terms of the covenant.

COVENANT *to* SURRENDER *a* COPYHOLD ESTATE *to a* PURCHASER *in Fee, and* COVENANTS *for* TITLE, &c.

COVENANT TO SURRENDER COPYHOLD.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the one part, and [*purchaser*], Parties.

COVENANT TO SURRENDER COPYHOLD.

of &c., of the other part: WHEREAS the said [*vendor*] is seised of or well entitled unto the inheritance in fee-simple in possession, according to the custom of the manor of [A.], of and in the copyhold or customary messuages, &c. hereinafter covenanted to be surrendered: AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] *for the absolute purchase of the said copyhold or customary messuages, lands, tenements, and hereditaments, at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— of &c., paid by the said [*purchaser*] to the said [*vendor*] at or before the execution of these presents, the receipt whereof he the said [*vendor*] doth hereby acknowledge, and of and from the same doth release and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, he the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*purchaser*], his heirs and assigns, that he the said [*vendor*] or his heirs shall and will, on the request and at the costs and charges of the said [*purchaser*], his heirs or assigns, at the next or some other subsequent court baron to be holden for the said manor of [A.], or out of court, as soon as may be, surrender into the hands of the lord or lady of the said manor for the time being according to the custom of the same manor, All &c. *(describe the parcels to be surrendered, and insert general words, and the reversion and reversions, &c., and all the estate, &c.). To the use* of the said [*purchaser*], his heirs and assigns for ever, to the intent that the said [*purchaser*], his heirs or assigns, may be admitted a tenant or tenants of the said copyhold premises; TO HOLD the same at the will of the lord, according to the custom of the said manor, and by the rents, suits, and services therefore due and of right accustomed. AND the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*purchaser*], his heirs and assigns, that, (notwithstanding, &c.), he the said [*vendor*] is now lawfully and rightfully seised of and in, or well entitled unto, the said messuages, &c. hereinbefore covenanted to be surrendered, for a good estate of inheritance in fee-simple in possession, according to the custom of the said manor; *And also*, that (for and notwithstanding any such act, deed, mat-

Recital of vendor's title and agreement for the purchase.

[*507]

Testatum.

Vendor covenants to surrender the premises to the use of the purchaser, in fee.

Covenants by vendor that he is lawfully seised;

—and hath power to surrender;

ter, or thing as aforesaid,) He the said [*vendor*] now hath in himself good right and lawful and absolute authority to surrender all and singular the said messuages, &c. hereinbefore covenanted to be surrendered as aforesaid, with the appurtenances, *To the use of the said [*purchaser*], his heirs and assigns, for ever, in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that he the said [*purchaser*], his heirs and assigns, shall and lawfully may, from time to time, and at all times hereafter, peaceably and quietly hold and enjoy the said messuages, &c. hereinbefore covenanted to be surrendered, with their respective appurtenances, and receive and take the rents and profits thereof to and for his and their own use, without any eviction or interruption from or by him the said [*vendor*] or his heirs, or of any other person or persons whomsoever, lawfully claiming any estate, right, title, trust, or interest, in, to, or out of the same premises, from or under him or them, or by, from, or under his, their, or any of their acts, defaults, privity, consent, or procurement; And that free and clear, or by him the said [*vendor*], his heirs, executors, or administrators, effectually kept indemnified of, from, and against all and all manner of gifts, grants, surrenders, rights, titles, and incumbrances whatsoever, made, done, committed, or suffered by the said [*vendor*], or by, through, or with his act, default, privity, consent, or procurement; *And moreover*, that he the said [*vendor*], and his heirs, and every other person whosoever lawfully claiming any estate, right, title, trust, or interest, of, in, to, or out of the said messuages, &c. hereinbefore covenanted to be surrendered as aforesaid by, from, or under him or them, shall and will from time to time, and at all times hereafter, upon the reasonable request, and at the costs and charges of the said [*purchaser*], his heirs or assigns, make, do, acknowledge, levy, suffer, execute, and perfect, all such further acts, things, conveyances, surrenders, and assurances in the law whatsoever, for the more effectually surrendering and assuring the said messuages, &c. hereinbefore covenanted to be surrendered, with their appurtenances, to the use of the said [*purchaser*], his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor, as by the said [*purchaser*], his heirs or assigns, or his or their counsel learned in the law, shall be reasonably required. In witness, &c.

COVENANT TO SURRENDER COPYHOLD.

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—for quiet enjoyment;

—free from incumbrances;

—and for further assurance.

RELEASE IN FEE AND ASSIGNMENT OF TERMS.

RELEASE *in* FEE, *with short Recitals, to two* PERSONS *in* EQUAL SHARES, *and* ASSIGNMENT *of* TERMS, *by the same Deed, in* TRUST *to* ATTEND (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [A.], [*assignor of*

(*a*) See some observations on Assignments of Terms, (*ante*, Vol. 5, p. 479). Though it it is generally advisable to assign the terms by a separate deed, yet as, in order to avoid expense, the release and assignment are sometimes incorporated in the same deed, it seemed proper to give a precedent adapted to such a case. The precedent in the text exemplifies a short mode of referring to the creation of terms. Where several terms affecting distinct portions of the property are to be assigned, they may of course be vested in the same trustee; but, where the terms relate to the same portion of the property, they should be assigned to different trustees, in order to prevent a merger of the elder term. *Hughes* v. *Robotham*, Cro. El. 302†; *Stephens* v. *Bridges*, 6 Madd. 68. If both the terms are of considerable antiquity, this may not be a matter of much importance; but, if one be recently created, the merger is carefully to be avoided, because it would deprive the purchaser of protection against incumbrances antecedent to the creation of the younger term. If either of the terms is extinguished, (and one subsisting term is of course sufficient for every purpose), the extinguishment should be of the younger term, which accordingly may be surrendered to the person seised of the legal inheritance; but, previously to such a step being taken, it should be ascertained that grounds do not exist for presuming the surrender of the elder term, according to the modern doctrine. However numerous the terms may be, the number of the trustees never need exceed two, because, if every second term is vested in one trustee, the intervening alternate terms outstanding in the other trustee will prevent a merger. Thus, if there be four terms, respectively created in 1750, 1760, 1770, and 1780, the terms of 1750 and 1770 may be assigned to one trustee, and the terms of 1760 and 1780 to the other, and all the

Mode of preventing attendant terms from merging in each other.

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† As to the merger of terms, see Sugd. Vend. 8th ed. 397; and 3 Prest. Conv. *passim*. Also *post*, Vol. 8, p. 1, *et seq.*

RELEASE IN FEE AND ASSIGNMENT OF TERMS.

2000 *years' term*], of &c., of the second part; [B.], [*assignor of* 1000 *years' term*], of &c., of the third part; [C.], [*purchaser of one moiety*], of &c., and [D.], [*purchaser of other moiety*], of &c., of the fourth part; [*dower-trustee*], of, &c.(*b*), of the fifth part; [*trustee of* 2000 *years' term*], of &c., of the sixth part; and [*trustee of* 1000 *years' term*], of &c., of the seventh part: WHEREAS the said [*vendor*] is seised to him and his heirs, in fee-simple, of the manor or lordship, &c. hereinafter described. AND WHEREAS the said [A.] is possessed of the said manor, or lordship, &c., for the residue of a certain term of two thousand years, In trust for the said [*vendor*], his heirs and assigns, and to attend the inheritance; And the said [B.] is also possessed of the same hereditaments, for the residue of a certain term of one thousand years, in trust for the said [*vendor*], his heirs and assigns, and to attend the inheritance; The commencement or grant of which several terms is hereinafter mentioned: AND WHEREAS the said [C.] and [D.] have contracted with the said [*vendor*] for the absolute purchase of the said manor or lordship, &c., and the fee-simple and inheritance thereof, (free from all incumbrances), except the land-tax, at the price or sum of £——, and have requested that the same may be conveyed to the uses hereinafter limited concerning the same; and that the said several terms of years may be assigned, in

Recital that vendor is seised in fee, and assignors are possessed of terms;

—of contract for purchase.

—of request of purchasers for conveyance and assignment of terms.

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terms by this means will be preserved from merger. It is rarely advisable, however, to keep so many terms on foot, as they tend much to increase the complexity of titles; though in practice it is usual to go on assigning all that has been assigned before, and it is not uncommon to find this extended to terms which clearly have no existence, they having been made determinable on the failure or performance of the purposes for which they were created, which event has happened. However, before we come to the conclusion that such term has ceased, it should be seen that nothing has been done to render the term, though originally defeasible, absolute; which effect it should seem would be produced by the owner of the inheritance joining in the assignment of it, for the remainder of the term absolutely, not merely as a directing, but as a *confirming* party.

(*b*) The respective moieties may be limited either to the same or a different person as dower-trustee. Here, to avoid increasing the number of the parties, he is the same; and this object might be farther attained by making each purchaser a trustee for the other.

Purchasers may be trustees for each other.

RELEASE IN FEE AND ASSIGNMENT OF TERMS.

Testatum.

trust for them the said [C.] and [D.], their heirs, appointees, and assigns, and to attend the inheritance of the said hereditaments, in such manner as is hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— of &c., to the said [*vendor*] paid by the said [C.] and [D.] in equal moieties, immediately &c., in full for the absolute purchase of the manor or lordship, &c. hereinafter described, and the fee-simple thereof, the receipt, &c., the said [*vendor*] *Doth*, by these presents, grant, bargain, sell, and release, unto the said [C.] and [D.], and their heirs, *(in the actual possession), &c., (describe parcels, with the usual general words):* And all the estate, &c., and all deeds, &c. To HAVE AND TO HOLD the said manor or lordship, &c., and all and singular other the hereditaments hereby released, or intended so to be, with their rights, royalties, members, and appurtenances, unto the said [C.] and [D.], and their heirs, for ever, to the uses, and upon the trusts, hereinafter limited concerning the same, (that is to say); As to, for, and concerning one moiety or half part (the whole into two equal moieties or half parts to be divided) of and in the said manor or lordship, &c., hereby released, or intended so to be, To SUCH USES, *for such estates, &c., (uses to prevent dower in favour of* [*C.*], *ut ante*, p. 461); And as to, for, or concerning the other moiety or half part (the whole into two equal moieties or half parts to be divided as aforesaid) of and in the said manor or lordship, &c., hereby released, or intended so to be, To SUCH USES, &c., *(like uses in favour of* [*D.*]); AND the said [*vendor*] doth for himself, his heirs, executors, and administrators, covenant and agree with the said [C.] and [D.], and their heirs (*c*), *(Add usual covenants*

In consideration, &c. vendor releases to purchasers.

Habendum to uses to prevent dower in each moiety.

Vendor covenants for title.

With whom covenants for title should be made.

(*c*) The correct mode of framing covenants for title is, to make them with the releasee or grantee to uses, and then they enure, incidentally, with the land, to the *cestuis que use*. The *habendum*, therefore, or the premises, if there be no *habendum*, (which, let it be remembered, is not an *essential* part of a deed), will always shew with whom such covenants ought to be entered into, and the proper words of limitation to be used; though the introduction of inaccurate words of limitation, as executors or administrators, instead of heirs, &c., would not prevent the covenants from taking due effect. *Lougher* v. *Williams*, 2 Lev. 92. The covenants

for title). AND THIS INDENTURE ALSO WITNESSETH, that, in further execution of the said recited Further *testatum.*

in the present case are in conformity to this rule; for the *habendum*, being to the two purchasers as joint tenants in fee, the covenants for title are entered into with them jointly in a similar manner, and not as owners of distinct moieties, according to their title under the declaration of the uses.

If the covenants, from having been made with the releasee to uses in the manner suggested, have become annexed to the land, they will continue so annexed through all the subsequent modifications of ownership which the land may undergo; and in this point of view it would seem to be quite immaterial whether the *cestui que use* (assuming him to be the donee of a power under the ordinary limitations in favour of a purchaser,) alien the land by exercising his power or by granting his estate; for, the mere shifting of the use (which is simply the effect produced by an appointment) cannot have the effect of severing from the land the covenants which have been once annexed to, or have actually begun to run with it in the hands of the first or immediate *cestui que use*. This seems to be the inevitable consequence of admitting the covenants to have passed with the land to the *cestui que use* at all, and is not contradicted by the case of *Roach* v. *Wadham*, 6 East, 289; for there the covenant, which was held not to bind the covenantor's appointee†, was entered into by the *cestui que use*, and not by the releasee to uses. (See some sensible observations on this subject, Cornish on Purch. Deeds, p. 50, n). Covenants once annexed, continue to run with the land.

If this view of the case be correct, it seems to shew, in extenuation of the evils said to belong to an appointment as a mode of conveyance, in regard to its effect upon covenants for title, &c., (*vide ante*, p. 450), that, though the covenants contained in *that* conveyance are, it should seem, covenants in gross, the adoption of this species of assurance does not deprive the appointee of the benefit of the covenants contained in the antecedent conveyance; unless, indeed, such covenants were entered into with the *cestuis que use*, and not with the releasee to uses; in which case, it is clear that the covenants would not pass to the appointee. See *Roach* v. *Wad-*

† This case is stated, *ante*, Vol. 4, p. 283. The question was not, whether the appointee had the benefit of covenants entered into with the donee of the power, but whether he was bound by the covenant of the latter to pay a fee-farm rent. The principle governing the two cases, however, has always been considered to be the same, and this case has been regarded as a leading authority. In a future note, in connection with the precedent of a grant of a fee-farm rent, it will be necessary to enter more at large into the discussion of the doctrine of this case. Observations upon *Roach* v. *Wadham.*

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contract, and also in consideration of ten shillings of &c., to the said [A.] paid by the said [E.] immediately &c., the

ham, 6 East, 283. There appears, however, to be great difficulty in saying, that the covenants would run with the land in such a case, even if the covenantee aliened by a conveyance operating upon his ownership, instead of exercising his power; but upon this point the opinions of the profession, it seems, are divided†.

Enough has been said, to shew the propriety of the recommendation with which we set out, that, where the releasee to uses and the purchaser are different persons, covenants which are intended to run with the land should be made with the former. By parity of reasoning, where the same person is both releasee to uses and *cestui que use*, the covenants should be

Whether covenants with *cestuis que use* are covenants in gross.

† Mr. Cornish, (Treat. Purch. Deeds, 50), observes, that there is no authority for saying that the covenants in such a case do not run with the land, and that the contrary was assumed in *Roach* v. *Wadham*. This may be conceded; but it deserves consideration, how far the learned author's opinion, traced to its foundation, is reconcileable with the acknowledged doctrine of that case. The ground upon which any covenant is held to pass to the alienee of the land, must be, that the covenant, *ab origine*, was annexed to the land; otherwise it is a mere covenant in gross; this forms the sole distinction between them; and to one class or the other every covenant must belong. But if this annexation has actually taken place, can the exercise of the power of appointment dissever the covenant so annexed? I apprehend, clearly not, and am conducted to this conclusion by the same reasoning which the author in question himself employs to shew that covenants entered into with the releasee to uses, and therefore actually annexed to, or running with the land, cannot be reduced to covenants in gross by any new limitation of the land, whether created by an appointment or by any other means. If, therefore, a covenant, once annexed, is not disannexed by an appointment, and if the appointee cannot maintain an action on the covenants in the case in question, which is the often-recognised doctrine of *Roach* v. *Wadham*, (and which is not here intended to be impugned), the conclusion, that, in the case under consideration, the covenants are covenants in gross only, and consequently not transferable to an alienee claiming under *any* species of conveyance, would seem to be inevitable. In short, the whole doctrine here advanced may be summed up in the following words:—A covenant once annexed to the land cannot be disannexed by any new limitation of the uses: a covenant in gross, though it may happen to reside in the person who has the land, never runs with the land at all.

said [A.], by the direction of the said [*vendor*], and on the nomination of the said [C.] and [D.], testified by their severally executing these presents, *Doth* by these presents bargain, sell, assign, and transfer unto the said [E.], his executors, administrators, and assigns, *All and singular* the manor or lordship, &c., hereinbefore described and hereby released, or intended so to be, and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances, or so much or so many of them as were assigned to and are now vested in the said [A.], as aforesaid; And all the estate, &c.; TO HAVE AND TO HOLD the said manor or lordship, &c., and all other the premises hereby assigned by the said [A.], or intended so to be, with their rights, royalties, members, and appurtenances, unto the said [E.], his executors, administrators, and assigns, henceforth, during all the residue therein now unexpired of a certain term of two thousand years, created * by an indenture of three parts, bearing date (*d*) &c., and made between &c., and for all other the term and estate of the said [A.] therein, upon the trusts hereinafter declared concerning the same.

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[A] at the request of vendor, &c., assigns to purchaser's trustee.

Habendum.

For the residue of a term of 2000 years created, &c.

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made with him and his heirs and assigns, or, rather, with him and his heirs alone, (in conformity to the *habendum*,) and not with the covenantee, his appointees, heirs, and assigns, since the latter mode of framing the covenant would seem to imply that the purchaser is made the covenantee in the character of *cestui que use*, and not, as the fact is, in that of releasee. Where the covenants in a conveyance are clearly covenants in gross, (as *all* covenants are usually considered to be which proceed from a person who has no estate in the lands), they will of course be made with the purchaser, on account of the convenience of bringing actions in his name, rather than in that of another person. The point is not farther material. In the preceding observations it has been assumed, that a covenant by a stranger with the owner of the land is necessarily a covenant in gross; and this is the commonly received opinion; but perhaps the point is not quite so clear, either upon principle or authority, as is generally imagined. (See note to the precedent of conveyance by assignees of bankrupt, *post*, p. 572).

(*d*) This deed exemplifies a short mode of stating the creation of terms. Another, and, perhaps, rather a neater method, is to refer to the deed creating the term in the recital, which then states that the trustee is possessed, &c. for all the residue of a certain term created by such a deed.

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AND THIS INDENTURE FURTHER WITNESSETH, &c., *(like assignment of the term of* 1000 *years by* [*B.*] *to* [*F.*]*)*; And it is hereby declared and agreed, [by and between the said parties to these presents, so far as they respectively are interested], that the said [E.] and [F.] respectively, and their respective executors, administrators, and assigns, shall henceforth stand and be possessed of and interested in the manor or lordship, &c., hereinbefore assigned to them respectively, [or intended so to be, with their and every of their rights, royalties, members, and appurtenances], for the several residues of the said several terms, for which the same premises are assigned to them as aforesaid; In trust for the said [C.] and [D.] respectively, and their respective heirs, appointees, and assigns, and to be from time to time assigned and disposed of as they shall direct or appoint; and in the mean time to attend and wait upon the reversion, freehold, and inheritance of the hereditaments and premises comprised in the same terms respectively, according to the several uses, trusts, intents, and purposes hereinbefore limited concerning the same, [and for the benefit of the several persons entitled, or to be entitled, under such uses, trusts, intents, and purposes, and] in order to protect the same [freehold, reversion, and inheritance] from and against all charges and incumbrances, if any such there be, mesne and subsequent to the creation of the same terms respectively. *(Covenant by trustees with purchasers that they have not incumbered).* In witness, &c.

Like assignment of 1000 years' term.

Declaration that trustees will stand possessed of the terms.

In trust as the purchasers shall direct, and in the mean time to attend the inheritance.

Trustees covenant against incumbrances.

RELEASE *in* FEE *by* MORTGAGOR *and* MORTGAGEE *in Fee to* PURCHASER. *(Variation where the* MORTGAGE *is for a* TERM *which the Mortgagee* SURRENDERS).

RELEASE IN FEE FROM MORTGAGOR AND MORTGAGEE.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, BETWEEN [*mortgagee*], of &c. (*a*), of the first part; [*vendor*], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*], of &c., of the fourth part. WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, 18—, being respectively made between the said [*vendor*] of the one part, and the said [*mortgagee*] of the other part; he the said [*vendor*] did convey and assure unto the said [*mortgagee*], his heirs and assigns, All and singular the —— and hereditaments hereinafter described, and hereby expressed to be released: *To hold* the same unto and to the use of the said [*mortgagee*], his heirs and assigns, for ever; subject, nevertheless, to a proviso or agreement in the said indenture of release contained for the redemption of the said hereditaments, on payment by the said [*vendor*], his heirs, executors, administrators, or assigns unto the said [*mortgagee*], his executors, administrators, or assigns, of the sum of 1,000*l.*, with interest for the same, at the respective times and in the manner therein mentioned: AND WHEREAS the said principal sum of 1,000*l.* is now owing upon the hereinbefore recited mortgage, all interest for the same having been paid up to the day of the date of these presents, as the said [*mortgagee*] doth hereby *acknowledge. AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the inheritance in fee-

Parties.

Recital of mortgage;

—of money due on mortgage;

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—of contract for purchase.

(*a*) In arranging the order of the parties to a deed, it is usual to place persons having the legal estate before those who have equitable interests only, and persons having freehold estates before those who have chattel interests.

Order of parties.

RELEASE IN FEE FROM MORTGAGOR AND MORTGAGEE.

simple of and in the said —— and hereditaments comprised in the hereinbefore in part recited indentures of lease and release, at or for the price or sum of 1,500*l.*, out of which said sum of 1,500*l.*, it hath been agreed that the said sum of 1,000*l.* owing to the said [*mortgagee*] as aforesaid shall be paid off and discharged. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 1,000*l.* of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] (at the request and by the direction of the said [*vendor*], testified by his executing these presents,) to the said [*mortgagee*] at or before the execution hereof, the receipt of which said sum of 1,000*l.* he the said [*mortgagee*] doth hereby acknowledge, and that the same is in full satisfaction and discharge of all monies owing upon the hereinbefore in part recited mortgage, and of and from the same doth acquit, release, and discharge the said [*vendor*], his heirs, executors, and administrators, and also the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns, for ever, by these presents; *And also* in consideration of the sum of 500*l.* of like lawful money, at the same time paid by the said [*purchaser*] to the said [*vendor*], the receipt of which said sum of 500*l.*, and the payment of the said sum of 1,000*l.*, in manner aforesaid, (making together the said purchase-money or price of 1,500*l.*), he the said [*vendor*] doth hereby acknowledge, and of and from the same respectively doth acquit, release, and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents (*b*); He the said [*mortgagee*] (at the request and by the direction of the said [*vendor*], testified as aforesaid,) *Doth* by these presents bargain, sell, and release; and the said

Testatum.

The mortgagee, in consideration of the mortgage money, and the mortgagor, in consideration of the remainder of the purchase-money, convey the estate to the vendee and his heirs.

(*b*) If the mortgage is for a term, which is to be surrendered, instead of the words here following in the text, say—

Variation where mortgage is for a term.

" And to the intent that the residue of the said term of —— years created by the hereinbefore recited indenture of mortgage of the —— day of ——, and all other the term, estate, and interest (if any) of the said [*mortgagee*] may be merged and utterly extinguished in the reversion and inheritance of the hereditaments hereby released, He the said [*mortgagee*],

RELEASE IN FEE FROM MORTGAGOR AND MORTGAGEE.

[*vendor*] *Doth* grant, bargain, sell, release, ratify, and confirm unto the said [*purchaser*] and his heirs, (in the actual possession of the said [*purchaser*] now being by virtue of a bargain and sale to him thereof made by the said [*mortgagee*] (*c*) and [*vendor*], in consideration &c., *ut ante*, p. 456), *All that* &c. *(describe parcels (d); and general words);* *And all* the estate, right, title, interest, use, trust, equity of redemption, inheritance, property, term, claim, and demand whatsoever, both at law and in equity, of them the said [*mortgagee*] and [*vendor*] respectively, of, in, to, or out of the same premises; *And* all deeds, evidences, and writings, which relate to or concern the same premises, or any part thereof, solely or together with other hereditaments of less value, which they the said [*mortgagee*] and [*vendor*] respectively now have in their respective custody, or can procure without suit, *together with true copies of all such other deeds, evidences, and writings, as concern or relate to the same premises, or any part thereof, jointly with any other lands or hereditaments of equal or greater value, the same copies when first taken to be made at the costs of the said [*ven-*

And all the estate, &c.

And all deeds, &c.

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at the request, and by the direction of the said [*vendor*], testified as aforesaid, *Doth* by these presents assign, surrender, and yield up; and the said [*vendor*] *Doth* grant," &c.

The surrender is sometimes made by a separate *testatum*, but it is more usual, at the present day, for the sake of brevity, to incorporate it with the release, as in the text; this can be conveniently done, where the inheritance is conveyed by release, but not where it is conveyed by appointment merely.

Lease for a year unnecessary.

(*c*) Where, by a deed conveying the inheritance in lands, an immediate term is assigned or surrendered, a lease for a year is unnecessary, since the deed operates as a grant of the reversion in fee expectant on the term. If, however, a lease for a year is executed, it should seem that the mortgagee-termor ought, in point of correctness, to be a granting party to it, he having the immediate estate.

(*d*) If the premises are in the occupation of a tenant from year to year, say—

" which said premises are now in the occupation of [A. B.], as tenant from year to year to the said [*vendor*]."

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dor], his heirs or assigns: To HAVE AND TO HOLD the said ——, and all and singular other the premises hereinbefore mentioned to be hereby released, with their appurtenances, unto the said [*purchaser*] and his heirs, (*To uses to prevent dower*, ut ante, p. 461; *Covenant by mortgagee that he has not incumbered*) (*e*): And (*f*) the said [*vendor*], for himself, his heirs, executors, and administrators, doth

Habendum to the vendee to uses to prevent dower.

Covenants by vendor—

(*e*) This covenant is the same where the mortgage was for a term only.

Mortgagor's covenants for the title, &c., covenants in gross.

(*f*) As the mortgagor has not the legal inheritance in the lands, that being in the mortgagee, his covenants, according to the general opinion, would be covenants in gross. The only mode of making them run with the land would be by conveying to him the fee for the purpose, which is never done in practice, and might sometimes be a dangerous experiment, by letting in incumbrances affecting him. The state of the mortgagor's liability under his covenants in such a case as the present is singular, and appears not to have been sufficiently regarded. The mortgagor having, on the creation of the mortgage, entered into absolute covenants for title, quiet enjoyment, and further assurance, with the mortgagee, these covenants, remaining undischarged at law, run with the land, and of course pass with it to the purchaser, who also takes limited covenants for title from him (the mortgagor), which we have seen are covenants in gross only. It cannot be doubted, however, that if any attempt were made by the purchaser to sue upon the vendor's absolute covenants for title, in such a case it would be restrained in equity; but certainly it is not correct to leave the liabilities and rights of the parties in this state. The mortgagor should be formally released from his covenants for title, &c., as well as from the payment of the mortgage debt. Many nice questions might arise as to the extent of the covenantor's liability in equity in particular cases. If a mortgagee with a power of sale exercises his power, and conveys the estate without the concurrence of the mortgagor, would the absolute covenants for title entered into by the mortgagor with the mortgagee, and which run with the land, be permitted in equity to be made available by the purchaser? If the mortgagor joins in the conveyance to the purchaser, and enters into restricted covenants, there can be little doubt, that this would be considered as an implied waiver of the absolute covenants. Some doctrine advanced in the case of *Paton* v. *Brebner*, 1 Bligh, 69, seems to bear upon the subject. In this case, Lord *Eldon* laid it down, that where a lessee, with whom an absolute covenant for quiet enjoyment has been entered into, purchases the demised property from the lessor, the relation of vendor and vendee, when acquired by the conveyance of the inheritance, puts an end to the covenants, however large and general, which existed between the lessor and lessee.

covenant and agree with the said [*purchaser*] and his heirs by these presents, in manner following, (that is to say), That (for and notwithstanding any act, deed, matter, or thing whatsoever, by him the said [*vendor*], or any person or persons lawfully claiming by, from, or under him or them, at any time heretofore had, made, done, committed, suffered, or executed to the contrary) (*g*), they the said [*mortgagee*] and [*vendor*], or one of them, at the time of the execution of these presents, are or is lawfully and rightfully seised of and entitled to the said ——, hereditaments, and premises hereinbefore mentioned to be hereby released, for an absolute and indefeasible estate of inheritance in fee-simple in possession; *And that* (for and notwithstanding any such act, deed, matter, or thing as aforesaid,) they the said [*mortgagee*] and [*vendor*], or one of them, now have or hath in themselves or himself full power and absolute authority by these presents and the bargain and sale for a year hereinbefore referred to, or one of them, to convey and assure all and singular the said —— and premises mentioned to be

RELEASE IN FEE FROM MORTGAGOR AND MORTGAGEE.

That, notwithstanding &c., he and mortgagee are seised in fee,

—and have right to convey.

(*g*) It is not usual to except tenancies from year to year at rack rent in a covenant which avers the freedom of the property from incumbrances; but, as such a tenancy constitutes an interest in the land, which does not pass by the conveyance, it is obvious, that, if created by the vendor himself, or any other person to whose acts his covenants extend, it ought to be excepted. In such case, add—

What should be excepted out of the vendor's covenant against incumbrances.

"except as hereinafter is excepted."

Perhaps, in no part of deeds has so much inaccuracy prevailed as in framing exceptions of this nature. Thus, while a tenancy, though an interest created by the covenantor, has *not* been noticed, a great variety of incumbrances *not* created by him, as land tax, quit rents, old terms of years attendant on the inheritance, manoral rights, &c., have been improperly introduced. It is clear, that no subsisting charge or outstanding interest ought to be noticed as an incumbrance which was not created by the person to whose acts the covenants relate; and an attendant term of years ought not, *in any case*, to be referred to as such, unless its existence otherwise appears on the face of the deed. Indeed, Sir Edward Sugden condemns the practice of treating an attendant term as an incumbrance at all. It must be remembered, however, that, though the trusts are satisfied, and the term is kept on foot as a protection, it is an outstanding *legal* interest.

RELEASE IN FEE FROM MORTGAGOR AND MORTGAGEE.

hereby released, with their appurtenances, *To the uses* and in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that the said —— and premises, with their appurtenances, shall henceforth, and at all times hereafter, remain, continue, and be *To the uses*, upon the trust, and for the intents and purposes hereinbefore limited and declared concerning the same; and that the same hereditaments and premises shall and may be peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without the interruption or denial of the said [*vendor*], his heirs or assigns, or of any other person or persons whomsoever, lawfully claiming any estate, right, title, or interest, in, to, or out of the same premises, by, from, or under him or them, or by, from, or under his or their acts, defaults, means, consent, privity, or procurement (*h*); *And that* free and clear, and freed and clearly exonerated and discharged, or by him the said [*vendor*], his heirs, executors, or administrators effectually kept harmless and indemnified of, from, and against all former and other estates, rights, titles, charges, and incumbrances whatsoever, had, made, done, or occasioned or suffered by him the said [*vendor*], or any person or persons lawfully claiming by, from, or under him, or by, through, or with his acts, default, means, consent, privity, or procurement (*i*); *And moreover*, that he the said [*vendor*], and his heirs, and every other person whosever lawfully claiming any estate, right, title, or interest, in, to, or out of the said —— and premises mentioned to be hereby released, by, from, or under him or them (*k*), shall and will from time to time, and at all times hereafter, upon the request and at the costs of the said [*purchaser*], his appointees, heirs, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause to be made, &c., every such further act,

—That the lands shall remain to the uses aforesaid;

—free from incumbrances;

—and for further assurance.

Exception as to tenancy.

(*h*) "except in respect of the estate or interest hereinafter excepted."

(*i*) "except the tenancy from year to year of the said [*tenant*], hereinbefore referred to."

(*k*) "except the person whose estate or interest is hereinbefore excepted.'

conveyance, and assurance in the law whatsoever, for the more effectually conveying and assuring all and singular the said —— and premises mentioned to be hereby released, with their appurtenances, *To the uses*, and in manner aforesaid, according to the true intent and meaning of these presents, as by the said [*purchaser*], his appointees, heirs, or assigns, or his, their, or any of their counsel in the law, shall be reasonably advised and required, [so as such further assurances, &c. *ut ante*, p. 465]. In witness, &c.

RELEASE IN FEE FROM MORTGAGOR AND MORTGAGEE.

CONVEYANCE *of an* EQUITY *of* REDEMPTION (*a*), *with* COVENANT *by the* PURCHASER *to* PAY *the* MORTGAGE-MONEY *and* INDEMNIFY *the* VENDOR.

EQUITY OF REDEMPTION IN FEE.

THIS INDENTURE, made &c., Between [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other

Parties.

(*a*) The following precautions should be taken by the purchaser of an equity of redemption:—1st. To ascertain by communication with the mortgagee, that the state of the account between him and the mortgagor is correctly represented by the latter. 2ndly. To obtain the mortgagee's assurance that he has received no notice of any other incumbrance†. 3rdly. To give him (the mortgagee) notice of the purchase. He ought also, it seems, to ascertain that the mortgagee has no mortgage on any other estate of the mortgagor. (*Vide ante*, Vol. 5, p. 401).

Precautions to be taken by the purchaser of an equity of redemption.

It is usual, in transferring an interest of this nature, to employ that mode of conveyance which would be proper to pass the mortgagor's estate, supposing it to be a legal and not an equitable interest; thus, a mortgagor of freehold lands generally conveys by lease and release, and of leaseholds by assignment; though the mortgages, if they have taken effect, will, in both instances, have exhausted the whole legal ownership: but it is the possibility of this not being the case, namely, of the mortgage having been inoperative, that has suggested, and can alone justify the practice of

As to conveyances of equities of redemption.

† This information the mortgagee would not be bound to give, but his refusal would, of course, excite the apprehensions of the purchaser.

EQUITY OF REDEMPTION IN FEE.

Recital of mortgage.

part; WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, respectively made between the said [*vendor*], of the one part; and [*mortgagee*], of &c., of the other part; in

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transferring equitable interests by conveyances adapted to convey *legal* estates. Probably the practice has, in some degree, sprung from, and been kept in countenance by the fact, that equitable interests are, in some cases, *necessarily* made the subjects of assurances adapted to legal *estates*, as fines and common recoveries; the former of which are requisite in order to pass the equitable freehold interests of married women, and the latter to bar equitable entails; for reasons which do not impugn the general doctrine here contended for. Conducive to the same end is the *fiscal* regulation, which imposes the *ad valorem* stamp on the conveyance, instead of placing it upon the contract, which is the only really operative instrument, where the subject of the contract is an equity of redemption. The universality of the practice, however, of treating an equity of redemption as the land itself, for the purposes in question, should not induce us to lose sight of the actual nature of the property, which is nothing more than the right (though often a valuable one no doubt,) to call upon the mortgagee to convey the legal estate on payment of the mortgage debt; and this right may pass by *any* instrument capable of operating as an equitable transfer.

If, therefore, the purchaser of an equity of redemption has a written contract, which would be binding on the vendor in a Court of equity, and which is in that Court regarded as an alienation, he has all which the vendor can transfer to him: and the subsequent more formal conveyance usually taken is absolutely nugatory. See *Staines* v. *Morris*, 1 Ves. & Bea. 8. It is probable, however, that the purchaser would not be entitled to make use of the contract to enforce the equity of redemption against the mortgagee, unless it were stamped as a "conveyance;" and the contract often does not shew the payment of the purchase-money; the vendor would, it should seem, also be entitled to call upon the purchaser to enter into a covenant for payment of the mortgage-money, and would himself be bound to enter into covenants for the title. For some of these purposes a further *deed* between the parties is requisite; for all of them it is convenient: and therefore, though the conveyance by lease and release, usually made for the purpose of passing an equity of redemption, is inoperative *as such*, and, where there is a previous binding contract, has not even the operation of an agreement; yet, as the release contains much that is useful for other purposes, it is not to be condemned as wholly supererogatory. Convenience is often consulted by adhering to established forms, even where the judgment does not completely approve them.

consideration of the sum of 500*l.* to the said [*vendor*] paid by the said [*mortgagee*], the said [*vendor*] did release (*b*) and confirm unto the said [*mortgagee*], his heirs and assigns, the messuage or tenement, lands, and hereditaments, hereinafter described and intended to be hereby granted and released, with their appurtenances; *To hold* the same unto and to the use of the said [*mortgagee*], his heirs and assigns for ever, subject to a proviso in the said indenture of release contained for the redemption of the premises upon payment by the said [*vendor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the sum of 500*l.* and interest, on the —— day of —— then next ensuing. AND WHEREAS the said principal sum of 500*l.* still remains owing upon the aforesaid security, but all interest in respect thereof hath been duly paid up to the day of the date of these presents (*c*), as the said [*vendor*] doth hereby testify and declare: AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said messuage or tenement hereinafter described and intended to be hereby granted and released, and the inheritance thereof in fee-simple, (subject nevertheless to the payment of the said principal sum of 500*l.*, secured by the said recited indenture of mortgage as aforesaid), at or for the price or sum of 600*l.*; which said several sums of 500*l.* and 600*l.* make

EQUITY OF REDEMPTION IN FEE.

Money due.

Contract for purchase, subject to mortgage.

(*b*) In this case it is supposed that the vendor, previously to the mortgage, was simply seised in fee. If he were entitled, under the ordinary uses to prevent dower, some practitioners would make the conveyance of the equity of redemption by appointment and lease and release, on the ground that such would have been the mode of assurance, if the estate were unaffected by the mortgage; which is the hypothesis on which the practice of taking a conveyance is founded; but as, in all probability, the whole legal ownership is in the mortgagee under the mortgage, leaving nothing, therefore, for either the appointment or lease and release to operate upon; and even if it were not, the lease and release would be quite adequate to pass the whole fee (with the exception of that particle of interest which is outstanding in the dower-trustee, unless he concurs); the deed ought not to be clogged with an appointment in addition to the release.

Appointment may be disused in conveying an equity of redemption.

(*c*) The purchaser will, of course, ascertain this fact.

EQUITY OF REDEMPTION IN FEE.

Testatum.

Consideration.

together the sum of 1,100*l.* (*d*). NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited agreement, and in consideration of the sum of 600*l.* of lawful money of Great Britain and Ireland to the said [*vendor*] paid by the said [*purchaser*] at or before the

[*525] *sealing and delivery of these presents, the receipt &c., and in consideration of the covenant hereinafter contained on the part of the said [*purchaser*], his heirs, executors, and administrators: He the said [*vendor*] *Doth* by these presents

Grant.

grant, bargain, sell, release, and confirm, unto the said [*purchaser*] and his heirs, (in the actual possession, &c.),

Parcels.

ALL THAT &c., *(describe parcels);* And all houses, &c.; And the reversion, &c.: And all the estate, &c., *ut ante*, p. 518:

Habendum.

TO HAVE AND TO HOLD the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore described and expressed to be hereby granted and released, with their rights, members, and appurtenances, (subject to and charged and chargeable with the payment of the said principal sum of 500*l.*, due and owing upon or by virtue of the said recited security), unto the said [*purchaser*] and his heirs for ever; TO THE USE of the said [*purchaser*], his heirs and assigns, for ever (*e*); *(Add covenants by vendor, that, subject to the mortgage, he is lawfully entitled, has power to convey, free from incumbrances, and for further assurance);* And,

Purchaser covenants,

in consideration of the premises, he the said [*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*vendor*], his

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(*d*) This is the sum on which the *ad valorem* duty must be paid.

As to limiting an equity of redemption to uses to prevent dower.

(*e*) Or to uses to prevent dower, which are sometimes limited, even of an equity of redemption, not for the purpose of excluding the dower, which of course cannot attach to an equitable interest; but, in consistency with the supposed possibility of the mortgage being inoperative; and because, when the estate is re-conveyed by the mortgagee, it would then simply be necessary to clothe these limitations with the legal estate: and the consequence of which is, that any testamentary disposition of the property executed by the purchaser in the interval between the acquisition of the equity of redemption and the conveyance by the mortgagee, would not (as it otherwise would) be revoked in equity by the latter. See 1 Jarm. Pow. on Dev. 560.

heirs, executors, and administrators, That he the said [*purchaser*], his heirs, executors, administrators, or assigns, shall and will pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the principal sum of 500*l.* hereinbefore mentioned to be secured, and due and owing to the said [*mortgagee*] upon *or by virtue of the said recited indenture of mortgage of the —— day of —— aforesaid; And all interest which shall hereafter grow due in respect thereof; And that he the said [*purchaser*], his heirs, executors, administrators, or assigns, shall and will, at all times hereafter, effectually keep harmless and indemnified the said [*vendor*], his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, of, from, and against the said principal sum of 500*l.*, and all interest thereon as aforesaid; *And also* of, from, and against all and all manner of actions, suits, and other proceedings whatsoever, which at any time or times hereafter shall be brought, had, commenced, or prosecuted against the said [*vendor*], his heirs, executors, or administrators; and also all costs, charges, damages, and expenses, which he or they shall or may bear, pay, sustain, expend, be at, or be put unto, for or by reason of the non-payment of the said principal sum of 500*l.* and interest as aforesaid (*d*). In witness, &c.

EQUITY OF REDEMPTION IN FEE.

—to pay the mortgage-money;

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—and to indemnify vendor therefrom.

(*d*) Though it should seem that a vendor is entitled to a covenant of this nature, yet, independently of express contract, the purchaser of an equity of redemption would be bound to indemnify the vendor against the mortgage debt; for, having become owner of the estate, equity raises in him an obligation to take on himself its burthens. See Lord *Eldon's* judgment in *Waring* v. *Ward*, 7 Ves. 337. But, where a covenant has been entered into, the purchaser's liability is regulated and fixed by the extent of such covenant. Upon this principle, it has been held, that, where a purchaser had entered into a covenant with the vendor to pay a mortgage debt, to which a third person was liable as surety for him (the vendor), and who afterwards paid the debt, the surety could not maintain an action of *assumpsit* against the purchaser, he being only liable to be sued upon his covenant of indemnity with the vendor; though it was admitted, that, if the mortgagor had simply transferred his interest to the purchaser, without any such covenant, the latter would have stood in his place as principal debtor, and the surety would have had the ordinary rights and remedies of a surety creditor against him. *Crafts* v. *Tritton*, 2 J. B. Moore, 411; *S. C.* 8 Taunt. 365. Sometimes, a separate deed or

Purchaser of equity of redemption bound to pay mortgage-debt.

ON PURCHASE BY A MORTGAGEE IN FEE.

CONVEYANCE *in* FEE *where the* MORTGAGEE PURCHASES *the* EQUITY *of* REDEMPTION (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*mortgagee*], of &c., of the first part; [*vendor*], of

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bond of indemnity is taken from the purchaser, because the purchase deed, which otherwise contains the covenant, goes into the custody of the purchaser.

Nature of the assurance where a mortgagee purchases the equity of redemption.

(*a*) Where a mortgagee in fee purchases the equity of redemption, if the object were merely to vest the equity of redemption in him, this might be done by a simple release to him of such equity; but, where it is intended to limit the estate to uses to prevent dower, a conveyance in the present form would be requisite. If, however, the mortgagee has previously contracted in writing for the purchase of the equity of redemption (and the same principle of course would extend to a parol contract, which part performance has rendered obligatory), it should seem that such contract, by clothing the legal inheritance of the mortgagee with the equitable title, *would let in his wife's dower*. The conveyance in the text is necessarily made to a third person as releasee to uses, the mortgagee being himself a granting party.

Whether an *ad valorem* duty attaches on a conveyance in consideration of the release of a debt.

The *ad valorem* stamp must, of course, cover the whole purchase-money, including the mortgage debt, which is released. The Stamp Act leaves it in doubt whether the release of a debt not secured by a mortgage of the purchased property is such a consideration as would subject the conveyance to an *ad valorem* duty. It is certainly not money, and may be much less valuable; for, obviously a debt of 500*l.* may not be worth 50*l.* This circumstance, coupled with that of the legislature having so expressly and anxiously declared that a *mortgage* debt shall be considered as purchase-money, renders it highly probable that the duty would be held not to attach in the instance suggested. And this view of the point derives some confirmation from its having been decided that a grant of an annuity, in consideration of a release of a debt, did not require enrolment under the stat. 17 Geo. 3, c. 26, which applied only to annuities granted in consideration of money. *Frost* v. *Frost*, 3 Barn. & Adolph. 612, n. In general, however, a person acts more wisely in paying the additional duty than in avoiding it at the risk of having the sufficiency of the stamp questioned.

ON PURCHASE BY A MORTGAGEE IN FEE.

&c., of the second part; [*mortgagee-purchaser*], of &c., of the third part; and [*releasee to uses, being also dower-trustee*], of &c., of the fourth part; *(Recite mortgage; and that principal money is owing,* ut ante, pp. 523, 524*):* AND WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the hereditaments hereby assured, and the inheritance thereof in fee-simple, free from the aforesaid mortgage debt, and all other incumbrances, at or for the price or sum of £——; And it hath been agreed that out of the said purchase-money the said principal sum of £——, owing to the said [*purchaser*] by virtue of the hereinbefore recited mortgage, shall be retained or deducted by the said [*purchaser*] in satisfaction of his said mortgage debt. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited contract, and in consideration of the sum of £—— so as aforesaid due and owing from the said [*vendor*] to the said [*purchaser*], from the payment of which said sum, *and from all claims and demands in respect thereof, and otherwise, by virtue of the covenants contained in the hereinbefore recited indenture of mortgage, the said [*purchaser*] doth hereby absolutely acquit, release, and discharge the said [*vendor*], his heirs, executors, administrators, and assigns; and also, in consideration of the further sum of £—— of lawful money of Great Britain and Ireland paid by the said [*purchaser*] to the said [*vendor*] at or immediately before the execution of these presents, the payment and receipt in manner aforesaid of which said several sums of £—— and £—— (making together the said purchase-money or sum of £——) the said [*vendor*] doth hereby acknowledge, and therefrom doth absolutely discharge the said [*purchaser*], his heirs, appointees, executors, administrators, and assigns; And also, in consideration of 10*s.* of like lawful money at the same time paid by the said [*releasee to uses*] to the said [*vendor*] and [*purchaser*] respectively, the receipt whereof is hereby acknowledged, he the said [*purchaser*], with the consent and approbation of the said [*vendor*], testified by his execution hereof, *Doth* by these presents bargain, sell, and release; And the said [*vendor*], at the request, and on the nomination of the said [*purchaser*], testified as aforesaid, *Doth* grant, bargain, sell, release, and confirm unto the said

Recital of contract.

That mortgage debt is to be retained out of the purchase-money.

Testatum.

In consideration of mortgage-money, and a further sum paid by purchaser to vendor, purchaser and vendor convey to releasee to uses.

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ON PURCHASE BY A MORTGAGEE IN FEE.

[*releasee to uses*] and his heirs *(in the actual possession, &c.*, ut ante, p. 455 (*b*); *parcels and general words); And also,* all the estate, right, title, interest, benefit and equity of redemption, claim and demand whatsoever, both at law and in equity, of the said [*purchaser*] and [*vendor*], and each of them, in, to, or out of the said ——, hereditaments, and premises, with their appurtenances (*c*): To HAVE AND TO HOLD the said —— and hereditaments, and all and singular the premises hereby released, or intended so to be, with their appurtenances, unto the said [*releasee to uses*], and his heirs, for ever, To the several uses, nevertheless, hereinafter declared *concerning the same, (that is to say); *(uses to prevent dower*, ut ante, p. 461); *And* the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*releasee to uses*] and his heirs, that, notwithstanding any act, deed, matter, or thing whatsoever made or done, or permitted to be made or done, by the said [*vendor*] to the contrary (*d*), the said [*purchaser*] and [*vendor*] are now seised to them and their heirs, or one of them is seised to him and his heirs, of a clear, rightful, absolute, and indefeasible estate of inheritance in fee-simple in possession in the said ——, hereditaments, and premises hereby released, or intended so to be, with their appurtenances; *And also,* that, notwithstanding any such act, deed, matter, or thing, as aforesaid, the said [*purchaser*] and [*vendor*] now have in themselves, or one of them now hath in himself, good right and absolute authority by these presents to release or otherwise assure the same ——, hereditaments, and premises, with their appurtenances, unto the said [*releasee to uses*] and his heirs, to the uses and in manner aforesaid, and according to the true intent and meaning of these presents; *And also,* that the said ——, hereditaments, and premises hereby released, or intended so to be, with the appurtenances, shall henceforth, and at all times

And all the estate, &c.

Habendum.

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Covenants by vendor, that, notwithstanding &c., he and purchaser are seised;

—have right to convey;

—that premises shall remain to uses;

(*b*) The lease for a year will be by the purchaser and vendor to the releasee to uses.

(*c*) The grant of the deeds is omitted, for the reasons given *ante*, p. 459.

(*d*) As the vendor has not the legal estate, these covenants, according to the general opinion, would not run with the land.

ON PURCHASE BY A MORTGAGEE IN FEE.

hereafter, remain and be to the uses and upon the trust hereinbefore expressed concerning the same; and that the same hereditaments and premises shall be at all times for ever hereafter peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without any eviction, interruption, or denial whatsoever from or by the said [*vendor*] or his heirs, or from or by any person or persons whomsoever having or rightfully claiming any estate, right, title, or interest, at law or in equity, in, to, or out of the said ——, hereditaments, and premises, or any part thereof, with the appurtenances, from, through, under, or in trust for him or them; *And that* free and clear, or freely, clearly, and absolutely discharged, or by the said [*vendor*], his heirs, executors, or administrators, effectually saved *harmless and kept indemnified from or against all former or other estates, rights, titles, charges, and incumbrances whatsoever, made, created, or occasioned by the said [*vendor*], or any person or persons lawfully claiming from, through, under, or in trust for him or them, or by his, their, or any of their acts, defaults, privity, or procurement; *And lastly*, that the said [*vendor*] and his heirs, and every person whosoever rightfully claiming any estate, right, title, charge, or interest, at law or in equity, in, to, or out of the said ——, hereditaments, and premises hereby released, or intended so to be, or any part thereof, with the appurtenances, from, through, under, or in trust for him or them, will at any time or times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his heirs, appointees, or assigns, make, do, acknowledge, levy, suffer, execute, and perfect every such lawful and reasonable act, deed, conveyance, or assurance in the law whatsoever, either by fine, common recovery, release, confirmation, or otherwise howsoever, for more effectually or satisfactorily granting, releasing, confirming, or otherwise assuring the said ——, hereditaments, and premises, or any part of the same, with the appurtenances, to the uses aforesaid, or otherwise, as the said [*purchaser*], his heirs, appointees, or assigns, shall order or direct, as by the said [*purchaser*], his heirs, appointees, or assigns, or his or their counsel in the law, shall be reasonably advised and required; so as such further assurances, or any of them, shall not contain in them,

—free from incumbrances;

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—and for further assurance.

ON PURCHASE BY A MORTGAGEE IN FEE.

or imply, any other or more general covenant or warranty than against the acts, deeds, and defaults of the person or persons who shall be required to make or execute the same, or his, her, or their heirs; and so as the person or persons who shall be required to make or execute such further assurance or assurances, shall not for that purpose be compellable to go from his, her, or their usual place or places of abode (*e*). IN WITNESS, &c.

(*e*) If a distinct grant of the deeds be executed agreeably to the suggestion *ante*, p. 461, add—

Further *testatum*. Grant of title deeds.

"AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the hereinbefore recited contract for purchase, and in consideration of the premises, *the said [*vendor*] *Doth* by these presents grant unto the said [*purchaser*], his heirs, appointees, and assigns, *All* and singular the deeds, evidences, and writings relating to the title of the said hereditaments hereby released, or intended so to be, now in the custody of the said [*vendor*], or which he can procure without suit, except only such deeds evidences, and writings as relate to the said hereditaments jointly with any other hereditaments belonging to the said [*vendor*], or which he has covenanted to produce to any other person or persons before the execution of these presents."

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APPOINTMENT IN FEE TO SUB-PURCHASER WITH SURRENDER BY MORTGAGEE.

APPOINTMENT *in* FEE *by* VENDOR *to a* SUB-PURCHASER, *by the Direction of the* ORIGINAL PURCHASER, *with the* SURRENDER *of a* TERM *by a* MORTGAGEE (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*mortgagee*], of

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(*a*) This precedent exemplifies the surrender of a term made by a separate *testatum*, as the frame of an appointment does not conveniently admit of another assurance being blended with it.

APPOINTMENT IN FEE TO SUB-PURCHASER, WITH SURRENDER BY MORTGAGEE.

&c., of the second part; [*mesne-purchaser*], of &c., of the third part; [*sub-purchaser*], of &c., of the fourth part; and [*dower-trustee*], of &c., of the fifth part; *(Recite conveyance to vendor to uses to prevent dower, and demise by him to mortgagee for* 1000 *years, to secure* 500*l. and interest; that interest has been paid, but principal remains due,* ut ante, p. 524); AND WHEREAS the said [*mesne-purchaser*], some time since contracted with the said [*vendor*] for the absolute purchase of the hereditaments hereinbefore referred to, and hereinafter described, and the inheritance in fee-simple thereof in possession, free from all incumbrances, at the price or sum of 800*l.* AND WHEREAS the said *[*sub-purchaser*] hath since contracted with the said [*mesne-purchaser*] for the purchase of the same hereditaments, for a like estate of inheritance in fee-simple in possession, free from all incumbrances, at the price or sum of 1000*l.* AND WHEREAS it hath been agreed, that the said principal sum of 500*l.* owing to the said [*mortgagee*] as aforesaid by virtue of the hereinbefore recited indenture of mortgage, shall be paid off and discharged out of the said purchase-money or sum of 800*l.* payable to the said [*vendor*] by virtue of the first hereinbefore recited contract as aforesaid. AND WHEREAS the said [*mesne-purchaser*] and [*sub-purchaser*] have severally requested the said [*vendor*] to limit and assure the said hereditaments to the uses hereinafter expressed; and the said [*sub-purchaser*] is desirous to have the residue of the said term of 1000 years, vested in the said *mortgagee*], merged in the inheritance of the said hereditaments. NOW THIS INDENTURE WITNESSETH, that, in compliance with such request, and in pursuance of the several hereinbefore recited contracts, and in consideration of the sum of 500*l.* of &c., at or immediately &c. paid by the said [*sub-purchaser*] to the said [*mortgagee*], at the request and by the direction as well of the said [*vendor*] as of the said [*mesne-purchaser*], testified by their severally executing these presents, the receipt, &c. (*ut ante*, p. 452); And also in consideration of the further sum of 300*l.* at the same time paid by the said [*sub-purchaser*] to the said [*vendor*], at the request and by the direction of the said [*mesne-purchaser*], testified as aforesaid, the receipt and payment of which said two several sums of 500*l.* and

Recital of vendor's conveyance and mortgage by him;

—of contract with original purchaser;

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—of sub-contract;

—of mortgage-money being to be paid.

Request to vendor to convey.

Testatum.

In consideration of sub-purchase-money paid to mortgagee, vendor, and original purchaser,

APPOINTMENT IN FEE TO SUB-PURCHASER, WITH SURRENDER BY MORTGAGEE.

300*l.* (making together the said purchase-money or sum of 800*l.*, payable by virtue of the firstly hereinbefore recited contract,) the said [*vendor*] doth hereby acknowledge, and from the same doth absolutely discharge the said [*mesne-purchaser*], his heirs, executors, and administrators, and also the said [*sub-purchaser*], his appointees, heirs, executors, administrators, and assigns; And also in consideration of the further sum of 200*l.*, of lawful money aforesaid, at the same time paid by the said [*sub-purchaser*] to the said [*mesne-purchaser*], the payment and receipt of which said several sums of 800*l.* and 200*l.* (making together the said

[*533] *purchase-money or sum of 1000*l.*, payable by the said [*sub-purchaser*] to the said [*mesne-purchaser*] by virtue of the secondly hereinbefore recited contract (*b*),) the said [*mesne-purchaser*] doth hereby acknowledge, and therefrom doth absolutely discharge the said [*sub-purchaser*], his appointees, heirs, executors, administrators, and assigns; He the said [*vendor*], at the request, and by the direction of the said [*mesne-purchaser*], and with the consent and approbation of the said [*mortgagee*], testified as aforesaid, by virtue and in execution of the aforesaid power or authority given and reserved to him by the hereinbefore recited indenture of release, and of all other powers and authorities enabling him in this behalf, doth hereby absolutely direct, limit, and appoint, that ALL THAT, *(describe parcels)*, together with all the rights, members, and appurtenances to the said premises belonging, shall henceforth remain, continue, and be to the uses, upon the trusts, and for the intents and purposes hereinafter declared concerning the same, that is to say, *(uses to prevent dower*, ut ante, p. 461*)*. AND THIS INDENTURE ALSO WITNESSETH, that, in compliance with the aforesaid desire of the said [*sub-purchaser*], and for the considerations hereinbefore expressed, [*And also*, in consideration of 10*s.* of lawful money aforesaid paid by the said [*sub-purchaser*] to the said [*mortgagee*] immediately before the execution of these presents, the receipt whereof is hereby acknowledged],

—vendor, by the direction of the mesne-purchaser, and with the privity of the mortgagee, appoints to uses in favour of sub-purchaser.

Further *testatum*.

(*b*) The *ad valorem* duty is regulated by the purchase-money payable by the sub-purchaser, whether more or less than the original purchase-money. *Vide post*, Vol. 8, p. 343.

the said [*mortgagee*], at the request and by the direction, as well of the said [*vendor*] as of the said [*mesne-purchaser*], testified by their severally executing these presents, *Hath* assigned, surrendered, and yielded up, and by these presents *Doth* assign, surrender, and yield up unto the said [*sub-purchaser*], his heirs and assigns, all and singular the ——, hereditaments, and premises hereinbefore described, and all other the hereditaments and premises which are comprised in or demised by the hereinbefore recited indenture of demise and mortgage of the —— day of ——, together with all the rights, members, and *appurtenances thereunto belonging; *And also* all the estate, right, title, property, interest, claim, and demand whatsoever, both at law and in equity, of the said [*mortgagee*] in or to the said hereditaments and premises, with their appurtenances; *To the intent*, that, by virtue of these presents, the residue now unexpired of the said term of 1000 years of and in the said hereditaments and premises created by the hereinbefore recited indenture of demise or mortgage, and all other the estate, term, and interest of the said [*mortgagee*] therein, by virtue of the said indenture, may merge in the freehold, reversion, and inheritance of the said premises, and be thereby extinguished. (*Covenant by mortgagee with purchaser, that he has not incumbered; by vendor with purchaser, that he has power to appoint, &c.*, ante, p. 474). IN WITNESS, &c.

APPOINTMENT IN FEE TO SUB-PURCHASER, WITH SURRENDER BY MORTGAGEE.

Mortgagee, by the direction of vendor, surrenders the term to sub-purchaser.

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And all the estate, &c.

To the intent that the term may merge.

CONVEYANCE *by* APPOINTMENT, *&c.*, *by* DONEES *of a* POWER *of* SALE *in a* MARRIAGE SETTLEMENT, *with the* CONCURRENCE *of the* TENANT *for* LIFE, *who* COVENANTS *for the* TITLE *and for the* PRODUCTION *of the* SETTLEMENT.

UNDER A POWER OF SALE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendors*], of &c., of the first part; [*tenant for life*], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*dower-trustee*], of &c., of the fourth part;

Parties.

UNDER A POWER OF SALE.

Recital of marriage settlement.

WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, 18—, the release being made between the Right Honourable [A. B.], Esquire, commonly called Lord Viscount F——, (the father of the said [*tenant for life*]), of the first part; the said [*tenant for life*], of the second part; the Right Honourable Mary, Lady P——, his wife, of the third part; the said [*vendors*], of the fourth part; and [*trustees of a term*], of &c., of the fifth part; (being the settlement made in pursuance of articles of agreement, *dated the —— day of ——, made in contemplation of the marriage between the said [*tenant for life*] and Mary, Lady P——, whose maiden name was Mary D——, certain lands and hereditaments in the county of ——, including, among others, the hereditaments hereinafter appointed and assured, or intended so to be, were limited and conveyed by the said [*father of tenant for life*] (*a*), *To the use* of the said [*tenant for life*] and his assigns, during his life, without impeachment of waste; with remainder *To the use* of the said [*vendors*] (*b*) and

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(*a*) If the vendor's covenants for title are extended to the acts of the settlor—a common, but not very correct practice, especially if the settlement contains such covenants—it should appear by the recitals in the settlement from whom the estate proceeds.

As to powers of sale and exchange in settlements.

(*b*) It is usual, in preparing marriage settlements containing the ordinary limitations in strict settlement, and powers, to constitute the same persons releasees to uses, trustees to preserve contingent remainders, and donees of the power of sale and exchange. This combination, though convenient as preventing the increase of parties, seems to have led to some confusion by the neglect accurately to discriminate between the respective characters thus associated in the same individuals; for hence, probably, has arisen the indefensible practice of making the donees of the power of sale not only revoke the uses of the settlement, and appoint to new uses, but also release to the use of the purchaser in fee, though their common law estate, as the releasees to uses, was instantaneously executed in the *cestuis que use*, by the operation of the statute of uses; and, under the *limitations* of the settlement, they take only a legal estate *pur autre vie*, expectant on the determination, by forfeiture, of the precedent estate for life, for the purpose of preserving the contingent remainders depending on that estate; which estate of the trustees, as well as the estate of the tenant for life, who is also usually made a granting party in the release, of course, are completely divested by the execution of the powers of revo-

their heirs, during the life of the said [*tenant for life*], *Upon trust* to preserve the contingent remainders; with

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cation and new appointment. The obtaining a conveyance from the tenant for life, indeed, is consistent with, and may seem to be justified (so far as one supererogatory proceeding can justify another,) by the practice which has so generally obtained, of adding a lease and release to an appointment by a person seised to the ordinary limitations to prevent dower, being designed to guard against the same risk, namely, the possibility of the appointment from defect of attestation not taking effect, and which certainly is an event less unlikely to happen in the present instance than in the case referred to, since it has been more customary in settlements than in purchase deeds to require the appointment to be attested in a manner not common in the execution of deeds in general—a well intended, but most inconvenient and inefficient expedient for preventing fraud. But the practice of taking a conveyance from the donees of the power of sale cannot be defended upon any such plea; their estate, as trustees to preserve contingent remainders, is of no real value, and, let it be remembered, was limited to them for a specific purpose, which purpose endures so long as the uses of the settlement remain unrevoked: and consequently, if the appointment to the purchaser is ineffectual to produce such revocation, which is the precise event in which the conveyance by the trustees is designed to take effect, they ought not to part with their estate discharged from the trust in question. In every point of view, therefore, their conveyance is improper. It is probable, however, that the practice of making the donees of the power of sale convey as well as appoint, has arisen from the circumstance rather of their being releasees to uses than of their taking an estate to preserve contingent remainders; a vague and indistinct notion prevailing, that, as such releasees, they had some estate or interest which ought to be conveyed, aided probably by a misconception of the effect of the doctrine maintained by some writers, that the releasees to uses in conveyances creating future and contingent limitations, take a possibility of seisin to serve the future uses as they arise; and which, it might be supposed, rendered it proper to transfer by an actual conveyance the seisin which, according to this doctrine, reverts to the releasees upon the execution of the powers of revocation and new appointment. It is scarcely necessary to observe upon the fallacy of such a notion; the seisin of the releasees was completely executed by the statute in the *cestuis que use;* and even supposing the doctrine of the *scintilla juris* to be well founded, the estate which reverted to the releasees would, of course, be instantaneously transferred to the new *cestuis que use*, *i. e.* the appointees, and not any particle of interest would be left in the releasees which could be the object of a conveyance. The *scintilla* doctrine, however, though

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Lease and release by donees of power unnecessary.

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remainder, *To the use* of the said [*trustees of a term*], their executors, administrators, and assigns, for the term of 500

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supported by the respectable opinion of Mr. Sanders, is rapidly losing ground, and has been so often and so ably discussed by late writers, that a particular examination of it in this place seems uncalled for.

Not necessary that new trustees should be invested with the seisin.

The junction of the common law seisin and the powers of sale in the same persons, has also given rise to a notion adverted to by the learned author of the "Treatise of Powers," Sugd. Pow. 194, that, where the powers of sale and exchange are accompanied by a power of appointing new trustees, and it is declared that the donees of the power (being also trustees to preserve contingent remainders,) shall, upon such appointment, vest the estate in the new trustees, they (the new trustees) should have a seisin to serve the uses in the same manner as the old trustees had; for which purposes two conveyances would be necessary: one, by the donees of the power appointing the fee to a stranger, and the other by such stranger, conveying it by lease and release to the new trustees, to the uses of the settlement, which would give them the desired seisin—an object not to be effected by an appointment. And the learned author in question suggests, that, in order to prevent the necessity of this circuity, it might be advisable expressly to declare in the deed creating the power, that it should not be necessary that the new trustees should be invested with the seisin to serve the contingent uses. But, instead of introducing this clause, would it not be better, in framing the settlement, either to avoid the expressions which have given rise to the objection, namely, the direction to convey to the new trustees, or, which it should seem would be equivalent, to vest the seisin and the power in different persons? It could scarcely *then* be contended that the new donees of the powe were to have a seisin which their predecessors never had. But the objection which this expedient is intended to obviate, appears to be wholly untenable. To suppose that the author of the settlement intended to annex the seisin to the power, *to the exercise of which it is not in any way essential*, seems to be in the highest degree absurd. The direction to convey the "estate," must mean the estate to preserve contingent remainders. Indeed, the insolidity of the objection is sufficiently apparent from the fact, that it is excluded by simply vesting the seisin and the power in different persons; for, the accidental union of these characters in the same individuals surely ought not to raise an inference that the donor of the power intended, by the ambiguous expressions in question, to annex them in indissoluble companionship, when they are so completely independent in their nature as to be vested, without the slightest inconvenience, in different persons.

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If, for the reasons suggested in the preceding observations, the powers

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years, without impeachment of waste, upon such trusts as are thereinafter declared, for raising the sum of 10,000*l.* for the portions of the daughters and younger sons of the said [*tenant for life*], by the said Mary Lady P——, his wife; with remainder *to the use* of the first and other sons of the said [*tenant for life*] on the body of the said Mary Lady P——, his wife, lawfully to be begotten, successively in tail male; with remainder *To the use* of the said [*tenant for life*], his heirs and assigns, for ever; In which said indenture of release is contained a power enabling the said [*vendors*] and the survivor of them, and the heirs of such survivor, at any time during the life of the said [*tenant for life*], at the request and by the direction of the said [*tenant for life*], (to be signified by any writing or writings under his hand and seal, and to be attested by two or more credible witnesses (*c*),) to make sale and dispose

Recital of power of sale.

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of sale and exchange, and of appointing new trustees, are given to persons who are neither the releasees to uses, nor the trustees to preserve contingent remainders, every *semblance* of reason for taking a lease and release from them is removed, and a purchaser's conveyance would consist merely of an appointment by the donees under their power; unless, for the sake of caution, a lease and release were taken from the tenant for life, and which would then be confined to him alone. A deed changing the trustees of a settlement or will, who have powers only and no estate, of course does not disturb any of the existing uses, and has no operation as a conveyance, but consists simply of a nomination of the new donees of the powers in question. In framing the power of making such nomination, the direction to convey should be wholly omitted.

Whether an indefinite power of sale is valid.

(*c*) The power of sale contained in this settlement has been modified, in order to prevent its validity being involved in the question, much agitated of late years among conveyancers, whether a power of sale, the terms of which admit of its being exercised at any time, is or is not invalid, as contravening the well-known rule which forbids the suspension of the absolute vesting of or of the dominion over property for a longer period than a life in being, and a minority or twenty-one years afterwards. Assuming that the power must be confined within the limits prescribed by this rule, it would be material to inquire whether the rule allows of an absolute period of twenty-one years to be added to a life, which is also a point on which much diversity of opinion has existed, but will in all probability shortly be set at rest by the case of *Bengough* v. *Edridge*, 1 Jarm. Pow. Dev. 394; S. C. 1 Sim. 173, which is now pending in the House of Lords. If that House should confirm the decision of the Courts below

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of all or any part or parts of the said —— and hereditaments thereinbefore mentioned to be granted and released, or any part thereof respectively, with their appurtenances,

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the validity of a limitation postponing the vesting of an estate for twenty-one years, absolutely, after an existing life, will be established, and, *è consequentiâ*, a power extended to this period will be clearly good. As the Editor has entered rather largely into the consideration of these questions in another place, (see 1 Jarm. Pow. Dev. 248, 388), and shall have a more fitting occasion for discussing them in a future note of the present work, he will here content himself with observing, that, notwithstanding the decisions (noticed in the sequel) in favour of the validity of an unrestricted power of sale, the cautious practitioner may still deem it prudent to confine the power to the period of an existing life or lives. This is often done, and probably in general without any view to the point under consideration, by requiring the consent of the tenant for life to the execution of the power, which, by rendering it exercisable during his life only, necessarily keeps it within due limits. If the parties are anxious to give the power the utmost scope consistent with its unquestionable validity, other lives may be added to that of the tenant for life, as the rule admits of *any* number of existing lives. Thus, the lands might be made saleable by the trustees, or their representatives, in the usual manner, with the consent of the tenant for life, and, after his decease, by the trustees themselves, or the survivor, but not by the representatives of the surviving trustee, in their or his own discretion; this would give to the power an extended duration for the period which any of the trustees might happen to survive the tenant for life; but, in general, such an extension would not be required; since it is not usual to confide powers of this kind, which are not essential to the provident *management* of the estate, to the uncontrolled discretion of trustees.

It may be observed, that the most eminent conveyancers of the last century seem to have been apprehensive that general powers of sale could not be supported; as it is very common, in settlements prepared by them, to find the power restricted to the period of twenty-one years after the death of the tenant for life. This shews also their opinion, tha an absolute term was allowed in addition to a life—a conclusion, indeed, to which the principle of some of the early decisions, the authority of which has been long recognised, seemed to the Editor strongly to lead; though the doubts that had been expressed by high authorities were quite sufficient to account for and warrant the agitation of the question.

The recent decisions, before adverted to, as affirming the validity of indefinite powers of sale in marriage settlements containing limitations in strict settlement, are—*Biddle* v. *Perkins*, 4 Simons, 135, decided by Sir *L. Shadwell*, V. C.; *Powis* v. *Capron*, Id. 138, n.; *Waring* v. *Coventry* Id. 140, decided by Sir *J. Leach*, M. R.

to any person or persons whomsoever, for such price or prices in money as to them the said [*vendors*], or the survivor of them, or his heirs, should seem reasonable; and, upon payment of the money arising by sale of the said premises, or any part thereof, to sign and give receipts for the same, which receipts should be sufficient discharges to any purchaser or purchasers; and that such purchaser or purchasers should not be answerable for the application of the purchase-money therein acknowledged to be received; and when any of the premises should be so sold, it was declared that it should be lawful for the said [*vendors*], or the survivor of them, or his heirs, by any deed or deeds, or writing or writings, to be sealed and delivered, &c., to revoke and make void all and singular the uses, estates, trusts, declarations, and agreements *limited and declared concerning the same in and by the said indenture now in recital, and, by the same or any other deed or deeds, writing or writings, to be sealed and delivered and attested in the manner aforesaid, to limit and appoint, convey and assure the same hereditaments unto the purchaser or purchasers thereof, unto such other person or persons, to such use or uses, and in such manner, as he, she, or they should direct (*d*), freed and absolutely discharged of and and from all and every the uses, estates, trusts, declarations, and agreements limited and declared by the said indenture now in recital, but subject to such lease or leases as should have been made in pursuance of the power thereinbefore for that purpose contained. And whereas the said [*vendors*], (at the request and by the direction of the said [*tenant for life*] (*e*), testi-

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Receipts of trustees to be good discharges.

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Recital of contract for sale.

(*d*) These words cannot be too general; the power should not be confined, as it sometimes is, to authorizing the trustees to convey to the use of the purchaser, which raises a question whether the ordinary uses to prevent dower can be limited.

(*e*) The power does not require the conveyance merely, but the *sale* to be made by the direction of the tenant for life, to be testified in the manner prescribed. In strictness, therefore, this direction ought to have been obtained previously to making the sale; for it has frequently been decided, that the subsequent approbation of an act is not sufficient, where previous consent is requisite; (see *Clarke* v. *Smith*, 19 Ves. 21); the object of such requisitions being to obtain the benefit of the unbiassed exer-

Tenant for life should concur in the sale, and not merely in the conveyance.

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fied by this writing under his hand and seal, and attested by the two credible persons, whose names are intended to be hereupon indorsed as witnesses to the signing, sealing, and delivery of these presents by the said [*tenant for life*], have contracted and agreed with the said [*purchaser*] for the absolute sale to him of the —— and hereditaments hereinafter described, and hereby intended to be assured, and the inheritance thereof in fee-simple in possession, free from all incumbrances, at or for the price or sum of 1000*l.*; AND WHEREAS the said [*tenant for life*] has consented to enter into the covenants on his part hereinafter contained. NOW

Testatum. THIS INDENTURE WITNESSETH (*f*), that, in pur-

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cise of the judgment and discretion of the party whose concurrence is required, and which object of course is defeated, if he is not consulted upon or informed of the act until it is done.

It is usual, however, in practice, to be satisfied with the concurrence of the tenant for life in the conveyance, without requiring evidence of his assent to the sale. In fact, the sale is generally made by the tenant for life himself; the trustees, though appearing on the face of the conveyance to be the principal actors, doing little more than executing the deeds, and receiving the money in performance of *his* contract. The Court would certainly be very unwilling to entertain an objection founded on the want of the previous consent of the tenant for life, testified in the manner required, he having joined in the conveyance; and probably would answer it by saying, that, as the contract for sale was invalid for want of the required consent, the conveyance itself, in which the tenant for life *has* concurred, is to be regarded as the really operative and binding contract; and therefore the requisition of the power is satisfied. The recital of course will treat the tenant for life as concurring in the sale, and not in the conveyance merely.

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Powers of sale, how to be framed.

(*f*) The exercise of a power of sale, it is obvious, includes both the revocation of the subsisting uses of the settlement, and the limitation of the new uses in favour of a purchaser; and therefore it is correct to accompany such a power with express provisions of this nature; but they are not essential; for, if the settlement simply authorized the donees to sell and convey, it would be sufficient. Bishop of *Oxford* v. *Leighton*, 2 Vern. 367. The express power to revoke, indeed, is often omitted, being in effect comprised in the power to appoint, since every new limitation of uses necessarily involves the revocation of the old or subsisting uses for which they are to be substituted. The purchaser's conveyance will assume the form, either of a deed of revocation and new appointment, or of a deed of

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Vendors, by the direction of tenant for life, revoke the uses of the settlement.

suance of the said recited contract, and for the consideration hereinafter expressed, the said [*vendors*], at the request, and by the direction of the said [*tenant for life*], (testified as aforesaid), pursuant to and by virtue of the power or authority in the said [*vendors*] for this purpose vested by the hereinbefore recited indenture of release and settlement, and of every other power or authority in anywise enabling them in this behalf, *Do*, by this present deed or writing, by them sealed and delivered in the *presence of [*542] and attested by the two credible persons whose names are intended to be hereupon indorsed as witnesses to the sealing and delivery thereof by the said [*vendors*], revoke, determine, and make void All and every the uses, trusts, powers, and provisoes in and by the hereinbefore recited indenture of release and settlement limited concerning the said —— and hereditaments hereinafter described and intended to be hereby assured, so far as the same uses, trusts, powers, and provisoes, or any of them, relate to or affect the said —— and hereditaments, or any part thereof.

Further *testatum*.

AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said recited contract, and in consideration of the said sum of 1000*l.* of &c. paid by the said [*purchaser*] to the said [*vendors*] at or immediately before the execution of these presents, at the request and by the direction of the said [*tenant for life*], testified as aforesaid, to be disposed of by them the said [*vendors*], according to the trusts of the hereinbefore recited indenture, the receipt and payment of which said sum the said [*vendors*] do hereby acknowledge, and from the same do, and the said [*tenant for life*] also doth, absolutely release and discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns, the said [*vendors*], pursuant to and by virtue of the power or authority in the said [*vendors*] for this purpose vested by the hereinbefore recited

Vendors, by the direction of tenant for life, in consideration of purchase-money, appoint to the uses after expressed.

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new appointment alone, as the power is framed in one way or the other. If the power does not require an express revocation of the uses of the settlement, the *testatum* clause in the precedent in the text, which contains the revocation, should be omitted; and this may be the more conveniently done, because the receipt of the purchase-money is acknowledged in the subsequent *testatum* clause.

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indenture of release and settlement, and of every other power or authority in anywise enabling them in this behalf, at the request and by the direction of the said [*tenant for life*], testified as aforesaid, *Do* by this deed or writing so by them sealed and delivered, and intended to be attested as hereinbefore is mentioned, limit, direct, and appoint that the said —— and hereditaments hereinafter described, and intended to be hereby assured, with the appurtenances, shall from henceforth remain and be to the uses, upon the trusts, and for the intents and purposes hereinafter expressed concerning the same (*g*). AND THIS INDENTURE *ALSO WITNESSETH, that, in further pursuance of the said recited contract, and for the consideration hereinbefore expressed, and also in consideration of the sum of 10*s.* of lawful money as aforesaid paid by the said [*purchaser*] to the said [*vendors*] and [*tenant for life*] at or before the execution of these presents, the receipt whereof is hereby acknowledged, they the said [*vendors*], at the request, and by the direction of the said [*tenant for life*], testified as aforesaid, and according to their estate, right, and interest, *Have* bargained, sold, released, and conveyed, and by these presents *Do*, &c.; And the said [*tenant for life*] *Hath* granted, bargained, sold, released, and confirmed, and by these presents *Doth*, &c. unto the said [*purchaser*] and his heirs, *(in the actual possession)*, &c., ALL THAT, &c., *(describe parcels)*; And the reversion and reversions, remainder and remainders, yearly and other rents and profits of all and singular the said hereditaments; *And also*, all the estate, right, title, interest, use, trust, inheritance, benefit, property, claim, and demand of them the said [*vendors*] and [*tenant for life*] respectively in and to the said —— and hereditaments hereinbefore described and expressed to be hereby assured, with their appurtenances; And all deeds, &c., (*ut ante*, p. 459); TO HAVE AND TO

Further *testatum*.

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Vendors and tenant for life release to the purchaser.

Parcels.

Reversion.

Estate.

Deeds.

Subsequent part of the precedent might be dispensed with.

(*g*) The conveying part of the deed might properly terminate here, for the reasons stated in a former note. (*Vide ante*, p. 536). If the subsequent part of the precedent be not wanted, it will simply be necessary for the person using the precedent to omit the next *testatum* clause, taking care to insert the description of the parcels in the appointment, instead of referring to the release for it.

HOLD the said —— and hereditaments, and all and singular other the premises hereinbefore described and expressed to be hereby assured, with their appurtenances, unto the said [*purchaser*] and his heirs, for ever; *(to uses to prevent dower,* ut ante, p. 461; *Covenant by vendors that they have not incumbered).* AND the said [*tenant for life*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said purchaser and his heirs in manner following, (that is to say), That, for and notwithstanding any act, deed, matter, or thing whatsoever made, done, committed, or knowingly suffered by the said *[*tenant for life*], or any of his ancestors (*h*), or any person or persons lawfully claiming through or under them or any of them, to the contrary, they the said [*vendors*] and [*tenant for life*], or some or one of them, now have or hath full power and lawful and absolute authority by these presents to limit and appoint, convey and assure, the said —— and hereditaments hereinbefore described and expressed to be hereby assured, with their appurtenances, *To the uses* and in manner aforesaid, according to the true intent and meaning of these presents; *And further,* that the said —— and hereditaments shall and may from time to time and at all times for ever hereafter remain and be to the uses hereinbefore declared concerning the same, and shall and may be peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without interruption, disturbance, or denial from or by the said [*tenant for life*] (*i*), or any person or persons lawfully claiming by, from, through, under, or in trust for him or any of his ancestors; *And that* free and clear of and from, and freely, clearly, and absolutely exonerated and discharged, or other-

UNDER A POWER OF SALE. *Habendum.*

Covenants by tenant for life,

—that the vendors have power to convey.

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—for quiet enjoyment;

—free from incumbrances;

(*h*) Where the settled estate belonged, before the marriage, to the covenantor's wife, having descended to her from an ancestor (which ought to be made to appear by the recital of the settlement), instead of "or any of his ancestors," say—

Variation where the estate has come from the wife, or her ancestor.

"or by the said [*wife*], his wife, or any of her ancestors."

(*i*) *Or,* as the case may be—

"or the said [*wife*], his wife, or any person or persons lawfully claiming by, from, through, under, or in trust for him or her, or any of her ancestors."

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wise by him the said [*tenant for life*], his heirs, executors, and administrators, effectually kept harmless and indemnified from and against all and all manner of former and other estates, rights, titles, charges, and incumbrances whatsoever, had, made, done, committed, or suffered by the said [*tenant for life*] (*k*) or any of his ancestors; *And moreover* that *he the said [*tenant for life*] (*l*) and his heirs, and every other person lawfully claiming any estate, right, title, trust, or interest in, to, or out of the said —— and hereditaments hereinbefore expressed to be hereby assured, by, from, through, under, or in trust for him, or by, from, through, under, or in trust for (*l*) any of the ancestors of him the said [*tenant for life*], shall and will from time to time and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause to be made, done, acknowledged, levied, suffered, and executed, *All* such further acts, deeds, conveyances, and assurances in the law whatsoever for the more effectually appointing, granting, or assuring the said —— and hereditaments hereinbefore described and expressed to be hereby assured, with the appurtenances, unto the said [*purchaser*] and his heirs, to the uses aforesaid, or otherwise, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised and required, so that, &c. (*ut ante*, p. 465); *And also*, that he the said [*tenant for life*], his heirs, executors, administrators, or assigns, shall and will from time to time and at all times hereafter (unless prevented by fire or other inevitable accident), upon every reasonable request, and at the proper costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, or any of them, produce at any place or places within the

—for further assurance; [*545]

—and to produce settlement.

(*k*) *Or*, as the case may be—

"or the said [*wife*], his wife, or any of her ancestors."

(*l*) *Or*, "and [*wife*] his wife, and her heirs, and every other person lawfully claiming any estate, &c., by, from, through, under, or in trust for her the said [*wife*], or any of her ancestors."

United Kingdom, to him or them, or to such person or persons as he or they shall direct, or at any trial, hearing, or examination in any Court of law or equity, or other judicature, or upon the execution of any commission, as occasion shall require, for the manifestation and defence of the title of the said [*purchaser*], his appointees, heirs, or assigns, to the said hereditaments hereby intended to be assured, the hereinbefore recited indentures of *lease and release and settlement of the —— and —— days of ——; and shall and will, on the like request, and at the like costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, deliver to him or them copies or a copy, to be attested if required, or abstracts or an abstract of the said indentures, or either of them, or any part thereof, and permit the said [*purchaser*], his appointees, heirs, or assigns, to compare such copies or copy, abstracts or abstract, with the same indentures or indenture, if he or they shall be desirous so to do. IN WITNESS, &c.

UNDER A POWER OF SALE.

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Also to deliver copies.

RELEASE *in* FEE *by* DEVISEES *in* TRUST *for* SALE *(one of whom is Heir).* COVENANTS *for* TITLE *by the* HEIR, *who is* BENEFICIALLY INTERESTED *in the* PURCHASE-MONEY (*a*). VARIATION *where the* HEIR-AT-LAW, NOT *a* TRUSTEE, *concurs. Also, where the Consent of a third Person is required to the Sale.*

IN FEE BY DEVISEES IN TRUST FOR SALE.

THIS INDENTURE, made the —— day of ——, BETWEEN [A.], of &c., [B.], of &c., and [C.], of &c., devisees

Parties.

(*a*) Where the vendor of freehold estate claims under a recent will, either beneficially or as trustee, it is always desirable for the purchaser to have the concurrence of the testator's heir, lest the will should happen to have been invalidated by circumstances not appearing upon the face of it, as the mental incapacity of the testator, his not having been present at the time of the subscription of the attesting witnesses, &c. A will, apparently the most correct in all its parts, may completely fail of operation from de-

As to obtaining the concurrence of the testator's heir.

IN FEE BY DEVISEES IN TRUST FOR SALE.

in trust named in the last will and testament of [*testatrix*], late of ——, deceased, (the said [C.] being also the eldest son and heir-at-law of the said [*testatrix*]), of the first part (*b*); [*purchaser*], of &c., of the second part; and [*purchaser's trustee*], of &c., of the third part: WHEREAS the said [*testatrix*], being seised to her and her heirs in fee-simple of the close and hereditaments hereinafter described and hereby released, or intended so to be, by her last will

Recital of will.

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fects of this kind; for, however reprehensible is the conduct of witnesses who attest a will without satisfying themselves of the testator's sanity, and that the statutory regulations have been complied with, yet their subscription of the memorandum of attestation does not preclude the heir from shewing by their (the witnesses') own testimony that the will was not duly executed. The respectability of the witnesses is a purchaser's chief security against the danger in question; therefore, if they are not persons of character, and the will is of recent date, the motive for requiring the concurrence of the heir acquires additional force. Where the heir takes a beneficial interest in the purchase-money, as in the present case, there is, of course, less difficulty in inducing his concurrence than where he is wholly excluded from all benefit; though the value of such concurrence is diminished in precisely the same proportion, on account of the greater improbability of the heir ever calling in question the validity of the will. But though it is usual to consider the heir as possessing the alternative title, in the event of the failure of the devise, yet it is to be observed that this is not necessarily the case, for there may happen to be in existence an anterior will, which would be called into operation by the vacating of the subsequent devise: and here the reader can scarcely fail to be reminded (supposing him to have heard) of the often-told story of the heir, who finding a will of his ancestor, recently deceased, which partially excluded him, destroyed it, and then communicated to a friend of the deceased the intelligence of his ancestor's intestacy; when, to his astonishment and dismay, the latter intimated that he had in his possession a will, long since executed by his deceased friend, which, when produced, was found to exclude the heir *entirely*, and was therefore much more disadvantageous to him than the *later* will which he had destroyed, and by which, but for his own act, the discovered will would have been superseded.

Heir not necessarily let in by the vacating of a will.

A person using the precedent in the text, in a case in which trustees sell simply, without the concurrence of any beneficial owner, has only to omit those parts of the precedent which relate to such owner.

(*b*) The heir, if he is not previously a party in another character, or any other person joining to testify his concurrence in the sale, will be the party of the second part.

and testament in writing, bearing date on or about the —— day of ——, duly executed and attested for the devise of freehold estates, gave and devised unto the said [*vendors*], their heirs and assigns, *All* her real estate of what nature or kind soever, upon the trusts thereinafter expressed concerning the same, (that is to say); *Upon trust* that they the said [*vendors*], or the survivors or survivor of them, or the heirs of such survivor, should, as soon as conveniently might be after her decease (*c*), sell and absolutely dispose of all the real estate of her the said [*testatrix*], either together or in parcels or lots, at public auction or by private contract, for such price or prices in money as they her said trustees, or the survivors or survivor of them, or his heirs, could obtain for the same, and should apply and dispose of the money arising from such sale or sales in the manner therein expressed; And the said [*testatrix*] declared that the receipt and receipts of her said trustees, or the survivors *or survivor of them, or his heirs, for any monies paid to them or him in the execution of the said trust, should effectually discharge the person or persons paying the same from all responsibility in respect of the application thereof: And whereas the said [*testatrix*] departed this life shortly after the date of her said will, without having revoked or in anywise altered the same; which said will, on or about the —— day of ——, in the year——, was duly proved by [T. L.], one of the executors therein named, in the Prerogative Court of the Archbishop of Canterbury: And whereas the said [*heir-at-law*] is the heir-at-law of the said [*testatrix*], being her eldest son by [A. B.], her late husband, deceased, with whom she intermarried at ——, in or about the month of ——, 18—, and the said [*heir*] was christened at ——, on or about the —— day of ——: And whereas a public auction was held at the Auction Mart, in Bartholomew Lane, London, on the —— day of —— last, by the order, and on the behalf of the said [*vendors*], the trustees named in the hereinbefore recited will of the said [*testatrix*] (*d*),

IN FEE BY DEVISEES IN TRUST FOR SALE.

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— of death of testatrix, and probate of will.

—The eldest son the heir.

—of sale by auction.

(*c*) "with the consent of the said [*consenting party*], to be testified by some writing under his hand."

(*d*) "with the consent of the said [*consenting party*], testified by his signing and sealing these presents.

IN FEE BY DEVISEES IN TRUST FOR SALE.

for selling, together with other parts of the real estate of the said [*testatrix*] deceased, the close and hereditaments hereby released, or intended so to be, with the appurtenances, and the inheritance thereof in fee-simple, free from all incumbrances, except as hereinafter is excepted; and the said [*purchaser*] attended the said auction, and offered the sum of £—— for the said close and hereditaments, and, being the best bidder for, was declared the purchaser of, the same,

[*549] at that price (*d*): [And *whereas the said [*purchaser*] hath requested that the said close and hereditaments so purchased by him as aforesaid may be conveyed to the uses, upon the trusts, and for the intents and purposes hereinafter expressed concerning the same (*e*):] And whereas the said [*heir*], being beneficially interested in the monies to arise from the real estate of the said [*testatrix*] by virtue of the trusts of her hereinbefore recited will, hath agreed to enter into the covenants hereinafter contained (*f*). NOW THIS INDENTURE WITNESSETH, that, in consideration of

Testatum.

In consideration

As to the recital of the mode of sale.

(*d*) Where a power or trust for sale authorizes a sale by public auction only, or private contract only, the recitals of the deed of conveyance should shew which mode of sale was pursued; and, where the subject of the conveyance is a reversion, it is proper to state the sale to have been by auction, if such is the fact, since a sale by auction of a reversionary interest is less liable to be impeached than a sale by private contract. *Vide ante*, Vol. 1, p. 153. In such cases it seems desirable to specify the time and place of sale, &c.; but, where the mode of sale is immaterial, the recital cannot be framed in terms too general; and to enter into a minute detail of the particulars respecting the sale, seems quite superfluous. The recital in the text might be more shortly expressed thus—

Shorter recital of sale by auction.

"And whereas the said [*vendors*], in the execution of their aforesaid trust, lately offered for sale by public auction the hereditaments hereinafter described and hereby released, and the inheritance in fee-simple thereof, free from all incumbrances, except as hereinafter mentioned; and at such auction the said [*purchaser*] became the highest bidder for, and was declared the purchaser of the same at the sum of £——."

(*e*) This recital is surperfluous, and is now usually omitted.

(*f*) Unless the heir takes a beneficial interest in the proceeds of the sale, it is not to be expected that he should covenant for the title.

IN FEE BY DEVISEES IN TRUST FOR SALE.

the sum of £—— of lawful money of Great Britain and Ireland, paid by the said [*purchaser*] to the said [*vendors*] immediately before the execution of these presents, in full for the absolute purchase of the said close and hereditaments hereby released, or intended so to be, for an estate in fee-simple, the receipt of which said sum the said [*vendors*] do hereby acknowledge, and from the same do hereby release and discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns, they, the said [*vendors*], according to their estate and interest, *and as to the said* [*A.*] *and* [*B.*] (*g*) by way of assurance only, and not by way of covenant or warranty (*h*), *Do*, by these presents, bargain, sell, and release (*i*) unto the said *[*purchaser*] and his heirs, for ever, (in the actual possession of the said [*purchaser*] now being, in virtue of a bargain and sale thereof made to him by the said [*vendors*] (*k*) in consideration of five shillings, &c.), ALL THAT &c., *(describe parcels);* and all hedges, ditches, fences, pales, rails, waters, watercourses, profits, commodities, advantages, emoluments, and appurtenances whatsoever to the said close or parcel of land, hereditaments, and premises belonging or in anywise appertaining; *And* the reversion and reversions, remainder and remainders, yearly and other rents and profits of the said close and hereditaments hereby released, or intended so to be, and in particular the yearly rent of 10*l.* 10*s.*, being an apportioned (*l*) part of the rent reserved

of purchase-money, trustees convey to purchaser.

[*550]

Lease for a year.

Parcels.

Reversion, &c. particularly part of an apportioned rent.

(*g*) If the heir is not one of the trustees, of course the words in italics must be omitted. Variations.

(*h*) If the sale is with the consent of a third person, say—

"with the consent and approbation of the said [*consenting party*], testified by his signing and sealing these presents."

(*i*) If the heir, not being one of the trustees, joins, add—

"and the said [*heir*] *Doth*, by these presents, grant, bargain, sell, release, and confirm, &c.

(*k*) If the heir, not being one of the trustees, joins, say—

"and [*heir*]."

(*l*) This apportionment, in order to be effectual, must have been made with the concurrence of the lessee; for a lessor is not at liberty arbitrarily to apportion the rent, and thereby render the lessee liable to several dis-

IN FEE BY DEVISEES IN TRUST FOR SALE.

All the estate.

by the lease hereinafter excepted, which is to be paid for or in respect of the said close and hereditaments, during the continuance of such lease; *And* all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim, and demand whatsoever, at law and in equity, of them the said [*vendors*] (*m*) respectively, of, in, to, out of, and upon the said close and hereditaments hereby released, or intended so to be: To have and to hold the said close and hereditaments hereinbefore described, and all and singular other the premises hereby released, or intended so to be, with their appurtenances, unto the said [*purchaser*] and his heirs, for ever, *To the uses*, upon the trusts, and for the intents and purposes hereinafter expressed concerning the same, (that is to say), *(uses to prevent dower*, ut ante, p. 461). *And each of them the said [*vendors*] (*n*), severally and apart from the other of them, and as to and concerning his own acts and defaults only, doth hereby for himself, his heirs, executors, and administrators, covenant with the said [*purchaser*] and his heirs, in manner following, (that is to say), that they the said [*vendors*], respectively, have not, nor hath either of them, made, done, executed, or knowingly suffered any act, deed, matter, or thing whatsoever, by means whereof the said close and hereditaments hereby released, or intended so to be, or any part thereof, are or is charged, incumbered, or in any manner affected in title, charge, estate, or otherwise howsoever. And the said [*heir-at-law*] (*o*) doth hereby, for himself, his heirs, executors, and administrators, covenant with the said [*purchaser*] and his heirs in manner following, (that is to say), That, notwithstanding any act, deed, matter, or thing whatsoever made, done, or permitted to the contrary by him

Habendum.

[*551]

Covenant by vendors that they have not incumbered.

Covenants by heir-at-law.

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tresses and actions for the respective portions; but the lessee is entitled to have the apportionment fixed by a jury. *Vide ante*, Vol. 4, p. 352.

(*m*) "and [*heir*]."

(*n*) The heir's two co-trustees joined in this covenant.

(*o*) Where the heir, taking no beneficial interest under the will, joins merely for the purpose of confirming the title, of course he cannot be expected to enter into covenants for title. Here he enters into those covenants on account of his being interested in the purchase-money.

IN FEE BY DEVISEES IN TRUST FOR SALE.

the said [*heir*], or by the said [*testatrix*], deceased, or any person or persons rightfully claiming by, from, through, under, or in trust for them or either of them, except as appears by these presents, they the said [*vendors*], or some of them, are now seised to them and their heirs, or one of them is now seised to him and his heirs of an absolute and indefeasible estate of inheritance in fee-simple of and in the said close and hereditaments hereby released, or intended so to be; *And also*, that, notwithstanding any such act, deed, matter, or thing as aforesaid, (except as aforesaid), they the said [*vendors*], or some of them, now have in themselves respectively, or one of them hath in himself, full power and lawful and absolute authority by these presents and by the bargain and sale hereinbefore referred to, or by one of them, to convey and assure the said close and hereditaments hereby released, or intended so to *be, to the uses, upon the trusts, and for the intents and purposes hereinbefore expressed concerning the same, according to the true intent and meaning of these presents; *And also*, that the said close and hereditaments hereby released, or intended so to be, shall henceforth, and at all times hereafter, remain, continue, and be to the uses, upon the trusts, and for the intents and purposes hereinbefore expressed concerning the same; and the same close and hereditaments shall and may be peaceably and quietly held and enjoyed, and the rents and profits thereof received and taken accordingly, without any interruption or denial whatsoever, of, from, or by the said [*heir*] or his heirs, or any other person or persons whomsoever rightfully claiming any estate, right, title, or interest, at law or in equity, of, in, to, or out of the same close and hereditaments, by, from, through, under, or in trust for him the said [*heir*], or by, from, through, under, or in trust for the said [*testatrix*], deceased, (other than and except the person whose estate or interest is hereinafter excepted): *And that* free and clear, and absolutely exonerated and discharged or otherwise by by him the said [*heir*], his heirs, executors, or administrators, at his or their own costs, effectually saved harmless and kept indemnified of, from, and against all and all manner of former and other estates, rights, titles, charges, and incumbrances, which at any time or times heretofore may have been made, occasioned, or suffered by the said [*heir*]

That notwithstanding &c., the grantors stand seised.

And have power to convey.

[*552]

That premises shall remain to the uses aforesaid.

Without interruption by covenantor, &c.

Free from incumbrances.

IN FEE BY DEVISEES IN TRUST FOR SALE.

and [*testatrix*], deceased, or either of them, or any person or persons rightfully claiming by, from, through, under, or in trust for them, or either of them, or by his, her, their, or any or either of their acts, means, consent, defaults, privity, or procurement, other than and except a certain indenture of lease, bearing date on or about the —— day of ——, by which the said [*testatrix*], deceased, demised the said close and hereditaments hereby released, with other hereditaments, to [*lessee*], of &c., his executors, administrators, and assigns, for a term of —— years, from ——, 18—, at the yearly rent of £——; *And moreover*, that he the said [*heir*], and his heirs, and all persons whosoever rightfully claiming any estate, right, title, trust, charge, or *interest, at law or in equity, of, in, to, out of, or upon the said close and hereditaments hereby released, by, from, through, under, or in trust for him or them, or by, from, through, under, or in trust for the said [*testatrix*], deceased, (other than and except the person whose estate or interest is hereinbefore excepted), shall and will, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, acknowledge, levy, suffer, execute, and perfect, all such further acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually releasing, confirming, or otherwise assuring the said close and hereditaments hereby released, or intended so to be, to the uses, upon the trusts, and for the intents and purposes hereinbefore expressed of the same, or as near thereto as circumstances will then admit, and according to the true intent and meaning of these presents, as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised and required; [so (*p*) as such further assurances, &c., *ut ante*, p. 465].

Except a lease granted by testatrix.

And for further assurance.

[*553]

(*p*) As to these seemingly restrictive words, *vide ante*, p. 465.

BY TRUSTEES, WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

RELEASE *in Fee by* TRUSTEES *for* SALE *of the Moiety of a Manor, with the* CONSENT *of the* CESTUIS QUE TRUST, *to a* PURCHASER, *where part of the* PURCHASE-MONEY *remains on Mortgage, secured by a* TERM *of* YEARS *limited to the* VENDORS (*a*). COVENANTS *for* TITLE *by the* CESTUIS QUE TRUST, *who are numerous. Variation where Vendor's Mortgage is in Fee.*

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendors*], of &c., of the first part; [*six persons be-* Parties.

(*a*) Where a vendor takes a mortgage to secure any unpaid portion of the purchase-money by the same deed which conveys the estate to the purchaser, it seems to have been the usual plan to limit to the vendor for this purpose a term of years, and to the purchaser the inheritance, (subject to the term), to the ordinary limitations to prevent dower. The incorporation of the mortgage and purchase deed in one conveyance, however, affords no reason why the mortgage to the vendor should not be in fee; and, as such mortgages have now, in a great measure, superseded mortgages for years, a variation adapting the precedent in the text to a mortgage in fee has been added. Where the vendor, being already seised in fee, takes a mortgage of the *inheritance*, no alteration is thereby made in the legal ownership, the equitable title alone being changed; which effect might have been produced by a mere declaration by the vendor that he holds the estate subject to redemption by the purchaser on payment of the mortgage-money, and with or without, as may be intended, a power of sale in default of payment. The deed, however, is seldom prepared in this form; and an objection to it is, that the covenants for title would be necessarily covenants in gross; whereas, if a seisin is created, and uses are limited on that seisin, the covenants entered into by the vendor with the releasee will run with the land (*vide ante*, p. 511), *i. e.* will follow the use; which ought in such case (in order to prevent the covenant from vesting in the covenantor himself) to be limited to a trustee for, and not to the vendor; and then, when the purchaser pays off the mortgage, and takes a conveyance of the estate, he will have the benefit of those covenants. This observation, however, only applies where the covenants for title are entered into by the person having the legal estate, and not to such

As to mortgages to vendors to secure unpaid purchase-money.

BY TRUSTEES, WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

neficially interested], of &c., of the second part; [*purchaser*], of &c., of the third part; and [*purchaser's trustee*],

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a case as the present, in which they proceed from persons having no interest in the land, and whose covenants (unless the doctrine suggested in a future note (*post*, p. 572) can be sustained) are necessarily covenants in gross. The advantage of incorporating the purchase deed and mortgage in fee in the same conveyance, instead of first vesting the estate in the purchaser, and then, by a separate and subsequent deed, making him immediately reconvey to the vendors, as mortgagees, is, that it prevents the possibility of the estate being subjected to any incumbrances affecting the purchaser. This danger, however, is of no great extent, on account of the rule in equity, which gives to the vendor an equitable lien on the estate for his unpaid purchase-money†, and which would not be superseded by his taking a mortgage on the same estate. The lien in question prevails against all persons claiming under the purchaser, (including his assignees in bankruptcy, who are bound by equities affecting the bankrupt,) except purchasers for valuable consideration without notice, against whom it would not prevail; but, as the execution of the mortgage, by which he parts with the estate, immediately follows the execution of the conveyance by which he derives it, the purchaser has no opportunity of creating such a title in a third person. The only material risk seems to arise from the possibility of the purchaser being a Crown specialty debtor; for, as the Crown is not bound by equities, it would take the land, discharged from the vendor's equitable lien; and this alone affords an adequate reason for preventing the estate from vesting for an instant in the purchaser. The claim of the Crown is, of course, effectually excluded by the limitations in the precedent in the text. Indeed, it has been decided, that, where a term is limited to the vendor by the purchaser's conveyance to secure his unpaid purchase-money, (as in this instance), the land is not affected by a specialty Crown debt of the purchaser, notwithstanding that a subsequent purchaser pays off the mortgage, and procures an assignment of the term to attend the inheritance; for, though attendant terms do not protect against such debts, yet here the term, never having been attendant in trust for the debtor, is, to all intents and purposes, *as to him*, a term in gross. *Vide ante*, p. 388.

As to mortgages to third persons advancing part of the purchase-money.

Sometimes, part of the purchase-money is advanced by a third person, who takes a mortgage on the estate; very little variation would be requisite in order to adapt the precedent in the text to such a case. The estate will, of course, be granted to the purchaser to the use of the intended mortgagee for a term, as in the text, with limitations of the inheritance,

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† As to this lien, see Sugd. Vend. 8th. ed. 551.

BY TRUSTEES, WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

of &c., of the fourth part: WHEREAS [*testator*], of &c., being, at the time of making his will hereinafter recited, and from thence to the time of his decease, seised of one moiety of the manor and other hereditaments hereinafter described, in fee-simple, duly made and published his last will and testament in writing, bearing date on or about the ——, *(recite will devising real estate to vendors in trust for sale, and bequeathing the monies arising from the sale to certain persons therein mentioned, and death of testator).* AND WHEREAS, by events which have taken place since the death of the testator, the said parties hereto of the second part are the only persons beneficially interested in the monies to arise by the sale of the said hereditaments and premises directed to be sold by the said will of the said [*testator*], and they the said parties are interested in the said monies in the proportions following, namely *(specify the proportions)* (*b*): AND WHEREAS the said [*vendors*], at the request of the said parties hereto of the second part, have contracted with the said [*purchaser*] for the absolute sale to him of the said undivided moiety of the manor and other hereditaments hereinafter described, for an estate of inheritance in fee-simple in possession, free from incumbrances, at or for the price or sum of 1200*l.*; and, upon the treaty for such sale, it was agreed that the sum of 700*l.*, part of the said purchase-money of 1200*l.*, should be paid

Recitals.

Late owner's seisin and will.

Contract for sale, and agreement that part of the purchase-money shall remain on mortgage.

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subject to the term, to the usual uses to prevent dower, in favour of the purchaser; or, if the mortgage is to be in fee, then the grant will be unto and to the use of the mortgagee in fee, subject to redemption on payment by the purchaser, his heirs, &c., of the mortgage debt. The reason for taking the mortgage directly from the vendor, without allowing the estate to pass through the purchaser, is stronger in the case of a mortgage to a third person than in that of a mortgage to the vendor himself, because the former has no lien on the estate, independently of his mortgage security, as we have seen a vendor has. The purchaser sometimes objects to the plan, because it discloses the mortgage to the vendor.

(*b*) As the only purpose for which the parties beneficially entitled join is to covenant for the title, it seems to be unnecessary to specify the particular events by which they have become entitled. It is sufficient that the amount of their respective aliquot shares, to which their covenants are restricted, is apparent.

BY TRUSTEES, WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

by the said [*purchaser*] upon or previously to the execution of these presents; and that the sum of 500*l.*, being the remaining part of such purchase-money, should remain *at interest upon security of the same hereditaments by way of mortgage in manner hereinafter mentioned; AND WHEREAS the said parties hereto of the second part have agreed to enter into the covenants on their part hereinafter contained:

[*557]

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited agreement, and in consideration of the sum of 700*l.* of &c., part of the said purchase-money or sum of 1200*l.* paid to the said [*vendors*], as trustees as aforesaid, by the said [*purchaser*], at or before the execution of these presents, at the request of the said parties hereto of the second part, testified by their severally executing these presents, the receipt of which said sum of 700*l.* the said [*vendors*] do hereby acknowledge, and from the same, they, and also the said parties hereto of the second part, do, and every of them doth, acquit, release, and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, for ever, by these presents; *And also*, in consideration of the further sum of 500*l.*, the remainder of the said purchase-money or sum of 1200*l.*, secured to be paid with interest in manner hereinafter mentioned, they the said [*vendors*], at the request, and by the direction of the said parties hereto of the second part, testified as aforesaid, *Do*, by these presents, bargain, sell, and release, And the said parties hereto of the second part *Do*, and every of them *Doth*, remise, release, and quit claim unto the said [*purchaser*], and to his heirs *(in the actual possession, &c.)* (*c*), ALL THAT one full and undivided moiety or half part (the whole into two equal parts to be divided) of and in ALL THAT, &c. *(describe manor, &c.)*, and of and in all and singular houses, &c., And all the estate, &c.; TO HAVE AND TO HOLD the said undivided moiety or half part hereby expressed to be hereby released of and in the said manor and hereditaments hereinbefore described, with their and every of their rights, members, and

In consideration of sum paid and sum secured by purchaser, vendors, at the request, &c. release.

Lease for a year.

Parcels.

Habendum.

(*c*) The lease for a year will be between the trustees of the one part, and the purchaser of the other part. The parties of the second part having no interest, legal or equitable, in the *land*, of course are no parties. As to the proper parties to a lease for a year, *vide ante*, Vol. 3, p. 162.

appurtenances, unto the said [*purchaser*] and his heirs for ever; *Nevertheless*, To THE USE of the said [*vendors*], their (*d*) executors, administrators, and assigns, from the day next before the day of the date hereof, for and during and unto the full end and term of 2000 years thence next ensuing, and fully to be complete and ended, without impeachment of or for any manner of waste, subject to the proviso hereinafter contained for making void the same term; And from and after the expiration or other sooner determination of the said term of 2000 years, and in the meantime subject thereto, To SUCH USES, &c. *(uses to bar dower*, ut ante, p. 461: *Covenant by vendors that they have not incumbered).* AND the said parties hereto of the second part, for themselves severally and respectively, and for their respective heirs, executors, and administrators, (but each of them as for and concerning an aliquot part or share only in the hereditaments hereby expressed to be hereby released, equal to and corresponding with his part or share in the monies to arise from the sale thereof as aforesaid, and not for the parts or shares, acts, deeds, or defaults of the others of them respectively), do hereby severally covenant and agree with the said [*purchaser*] and his heirs in manner following, (that is to say), that, notwithstanding any act, matter, or thing whatsoever at any time heretofore made, done, committed, or suffered by the said parties hereto of the second part respectively, or by the said [*testator*], deceased, or by any person or persons whomsoever claiming or deriving title through or

BY TRUSTEES, WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

Covenant by vendors that they have not incumbered.

—By *cestuis que trust*, according to their shares, that the releasors are seised in fee.

(*d*) If the mortgage is to be in fee, with a power of sale, substitute for the ensuing paragraphs in the text down to the covenants:—

" heirs and assigns for ever, subject, nevertheless, to the proviso or agreement for redemption and re-conveyance hereinafter contained, (that is to say); *(proceed with the proviso for redemption on payment of mortgage-money, with power of sale in default of payment*, ut ante, Vol. 5, p. 257)."

Variation where mortgage is in fee, with a power of sale.

Where the mortgage taken by the vendors is in fee, and not for a term, it is unnecessary to limit the equity of redemption to uses to prevent dower, but it may be simply declared, as in the mortgage precedent just referred to, that, on payment of the money, the mortgagee will reconvey in such manner as the purchaser, his heirs, or assigns, shall direct.

BY TRUSTEES, WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

under the said [*testator*], deceased, to the contrary, the said parties hereto of the first and second parts, or some of them, now are seised of or entitled to the said moiety hereby expressed to be hereby released of and in the said manor and other hereditaments hereinbefore described, for an estate of inheritance in fee-simple in possession, [without any manner of condition, contingent proviso, or power of revocation, and limitation of any new or other use or uses, or any other cause, matter, or thing, to alter, change, charge, revoke, make void, lessen, incumber, or determine the same]: *And that,* notwithstanding any such act, matter, or thing as aforesaid, they the said parties hereto of the first and second parts, or some of them, now have in themselves full power and absolute authority to release and assure the said moiety, expressed to be hereby released, of and in the said manor and other hereditaments hereinbefore described, unto the said [*purchaser*] and his heirs, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; *And further,* that the said undivided moiety hereby expressed to be hereby released of and in the said manor and other hereditaments hereinbefore described, shall and may, from time to time, and at all times hereafter, remain and be to the uses hereinbefore expressed concerning the same, and that the same shall and may be peaceably and quietly held and enjoyed, and the rents and profits thereof received accordingly (*e*), without any denial, eviction, or interruption, of, from, or by the said parties hereto of the second part, or any of them, or of, from, or by any other person or persons lawfully claiming through or under the said [*testator*], deceased; *And that* free and clear, and freely, clearly, and absolutely discharged or otherwise by the said parties hereto of *the second part, or some of them, their or some of their heirs, executors, or administrators, effectually kept indemnified from and against all and all manner of former and other gifts, grants, estates, titles, charges, and incumbrances whatsoever, had, made, done, committed, or suf-

Power to convey.

Quiet enjoyment.

Free from incumbrances.

[*560]

(*e*) If the mortgage is in fee, this covenant would still be applicable, the word *use*, in the singular, being substituted for "uses;" or it might be declared that it should be lawful for the covenantee and his heirs, and *cestuis que use*, peaceably to enjoy, &c.

fered by the said parties hereto of the second part, or any of them, or by the said [*testator*] deceased, or by any person or persons whomsoever, claiming through or under them or any of them: *And moreover* that they the said parties hereto of the second part, respectively, and their respective heirs, and every other person lawfully claiming any estate, right, title, trust, or interest, in, to, or out of the said moiety expressed to be hereby released of and in the said manor and other hereditaments hereinbefore described, or any part thereof, by, from, through, or under or in trust for them or any of them, or by, from, through, or under, or in trust for the said [*testator*], deceased, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, acknowledge, levy, suffer, and execute, or procure to be made, done, acknowledged, levied, suffered, and executed, all such further acts, deeds, matters, and things, conveyances and assurances in the law whatsoever, for the more effectually conveying and assuring the said undivided moiety expressed to be hereby released of and in the said manor and other hereditaments, with the appurtenances, *To the uses* hereinbefore limited concerning the same respectively, or such of them as shall be then subsisting; as by the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised and required, (so that &c. *ut ante*, p. 465). PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that, in case the said [*purchaser*], his heirs, executors, administrators, appointees, or assigns, shall and do pay or cause to be paid unto the said [*vendors*], their executors, administrators, or assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, between the hours of ten and eleven of the clock in the *forenoon of the —— day of —— now next ensuing, the sum of 500*l.* of lawful money of Great Britain, together with interest for the same after the rate of five pounds for every hundred pounds by the year, free from taxes, and without any other deduction, then and in such case, and immediately after such payment so made, the said term of 2000 years hereby limited in use to the said [*vendors*], their executors, administrators,

BY TRUSTEES, WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

For further assurance.

Proviso for redemption.

[*561]

BY TRUSTEES WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

and assigns, as aforesaid, shall cease, determine, and be absolutely void, to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding: And it is hereby agreed and declared between and by the said parties hereto, that the receipt or receipts in writing of the said [*vendors*], or of the survivor of them, or of the executors or administrators of such survivor, shall be an effectual discharge for the said sum of 500*l.* and interest, or any part thereof respectively, unto the person or persons paying the same; and such person or persons shall not be obliged to see to the application of the monies which in such receipt or receipts shall be expressed to be received; And the said [*purchaser*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*vendors*], their (*e*) executors, administrators, and assigns, in manner following, (that is to say), that he the said [*purchaser*], his heirs, executors, administrators, appointees, or assigns, shall and will pay or cause to be paid unto the said [*vendors*], their executors, administrators, or assigns, the said sum of 500*l.* of lawful money of Great Britain, with interest for the same after the rate aforesaid, free from taxes, and without any other deduction except as aforesaid, at the place, and at or on the day or time and in manner hereinbefore appointed for payment thereof, according to the true intent and meaning of these presents; *And that*, after default shall be made in payment of the said sum of 500*l.*, or the interest thereof, or of any part thereof respectively, at or upon the day or time hereinbefore appointed for payment thereof respectively, contrary to *the true intent and meaning of these presents, it shall be lawful for the said [*vendors*], (*f*) their executors, administrators, and assigns, from time to time, and at all times thereafter, during the then residue of the said term of 2000 years hereby limited in use to the said [*vendors*] as aforesaid, peaceably and quietly to enter into

Receipt of mortgagees or of the survivor to be a discharge for mortgage-money.

Purchaser covenants to pay the mortgage-money.

—For quiet enjoyment after default.

[*562]

Variations where mortgage is in fee.

(*e*) If the mortgage is in fee, add—

"heirs."

(*f*) If the mortgage is in fee—

"their heirs and assigns, from time to time, and at all times for ever thereafter, peaceably and quietly," &c.

and upon, and to hold and enjoy the said undivided moiety or half part expressed to be hereby released of and in the said manor and other hereditaments hereinbefore described, with their and every of their rights, members, and appurtenances, and to receive the rents and profits thereof to and for their own use and benefit, without any denial, eviction, or interruption whatsoever of, from, or by the said [*purchaser*], his heirs or assigns, or any other person or persons whomsoever: *And that* free and clear, and freely, clearly, and absolutely discharged, or otherwise by the said [*purchaser*], his heirs, executors, or administrators, effectually kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, estates, titles, charges, and incumbrances whatsoever: *And moreover*, that he the said [*purchaser*], and his heirs, and every other person lawfully claiming any estate, right, title, or interest in, to, or out of the said undivided moiety or half part expressed to be hereby released of and in the said manor and other hereditaments hereinbefore described, or any part thereof, shall and will, from time to time, and at all times hereafter, at the request of the said [*vendors*], their executors, administrators, or assigns, but at the expense of the said [*purchaser*], his heirs, executors, administrators, or assigns (*g*), make, do, acknowledge, levy, suffer, and execute, or procure to be made, done, *acknowledged, levied, suffered, and executed, all such further acts, deeds, conveyances, and assurances in the law whatsoever, for the more effectually conveying and assuring the said undivided moiety or half part of and in the said manor and other hereditaments (*h*), for all the residue which shall be then to come

BY TRUSTEES, WHERE PART OF PURCHASE-MONEY REMAINS ON MORTGAGE.

—Free from incumbrances.

—For further assurance.

[*563]

(*g*) If the mortgage is in fee with a power of sale, add—

"until the said hereditaments shall be sold and assured under the power of sale hereinbefore contained, and afterwards at the expense of the purchaser or purchasers thereof, his, her, or their heirs or assigns."

Variations where the mortgage is in fee.

(*h*) If the mortgage is in fee, say—

"unto and to the use of the said [*vendors*], their heirs and assigns, for ever, according to the true intent," &c.

BY TRUSTEES, WHERE PART OF PURCHASE MONEY REMAINS ON MORTGAGE.

Until default purchaser to enjoy.

and unexpired of the said term of 2000 years therein, according to the true intent and meaning of these presents, as by the said [*vendors*], their (*i*) executors, administrators, or assigns, or their counsel in the law, shall be reasonably advised and required: AND it is hereby agreed and declared between and by the said parties hereto, that, until default shall be made in payment of the said sum of 500*l.*, or the interest thereof, or of some part thereof respectively, contrary to the true intent and meaning of the aforesaid proviso and covenant for payment of the same, it shall be lawful for the said [*purchaser*], his appointees, heirs, and assigns, to hold and enjoy the said undivided moiety or half part of and in the said manor and other hereditaments, and to receive the rents and profits thereof for his and their own use and benefit, without the lawful denial, eviction, or interruption whatsoever, of, from, or by the said [*vendors*], or either of them, their or either of their executors, administrators, or assigns, or of, from, or by any other person or persons claiming by, from, through, or under them, or either of them. IN WITNESS, &c.

(*i*) If the mortgage is in fee, add—

"heirs."

BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

CONVEYANCE *of* FREEHOLDS *by* APPOINTMENT *and* RELEASE *by* BANKRUPT (*a*) *and his* ASSIGNEES, *and* SURRENDER *of a* TERM *by a* MORTGAGEE (*b*) *who receives the whole of the Purchase-money in part Discharge of a larger Sum due to him.* COVENANT *by the largest* PURCHASER *at an Auction to* PRODUCE TITLE DEEDS. *Variation where* MORTGAGEE *in* FEE *joins.*

THIS INDENTURE, made &c., BETWEEN [*mortgagee*], of &c., of the first part; [*three assignees of bankrupt*] (*c*), of Parties.

(*a*) The late General Bankrupt Act, 6 Geo. 4, c. 16, s. 78, authorizes "the Lord Chancellor, upon the petition of the assignees, or of any purchaser from them of any part of the bankrupt's estate, *if such bankrupt shall not try the validity of the commission, or if there shall have been a verdict at law establishing its validity*, to order the bankrupt to join in any conveyance of such estate, or any part thereof; and if he shall not execute such conveyance within the time directed by the order, such bankrupt, and all persons claiming under him, shall be stopped from objecting to the validity of such conveyance; and all estate, right, or title which such bankrupt had therein shall be as effectually barred by such order, as if such conveyance had been executed by him." Lord Chancellor may order bankrupt to convey in certain cases.

It seems that the bankrupt will not be ordered to join in the conveyance on the ground of his having been nonsuited in an action brought by him to try the validity of the commission, if a second action is pending; *Ex parte Thomas*, 2 Glynn & Jam. 278: nor though he be *nonprossed* in such second action, if the bankrupt will undertake to bring another action: and in this case the petition was ordered to stand over, in order to await the result of such action. *Ex parte Thomas*, 1 Mont. & M'Arth. Bank. Cas. 64.

(*b*) It rarely happens that a person becomes bankrupt without having mortgaged or otherwise incumbered his property. The precedent, therefore, in the text has been adapted to circumstances of this nature.

(*c*) *i. e.* The assignees chosen by the creditors and the official assignee appointed under the provisions of the recent act, 1 & 2 Will. 4, c. 56.

BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

&c., assignees of the estate and effects of [*bankrupt*], late of &c., a bankrupt, of the second part; the said [*bankrupt*], of the third part; [*purchaser*], of &c., of the fourth part; [*purchaser's dower-trustee*], of &c., of the fifth part; and [A. B.], of &c., of the sixth part: WHEREAS (*recite indentures of lease and release by which the property was conveyed to the bankrupt to uses to prevent dower, and an indenture of demise or mortgage by which they were demised by the bankrupt to the mortgagee for* 500 *years, for securing* 1600*l. and interest*); AND WHEREAS a fiat in bankruptcy, under the hand of the Lord High Chancellor of Great Britain, was, on or about the —— day of ——, duly issued, and is now in prosecution against the said [*bankrupt*], who was thereupon declared a bankrupt, and the said [*two assignees*] have been duly chosen assignees of his estate and effects, and the said [*official assignee*] hath been duly appointed official assignee under the said bankruptcy; And by virtue thereof and of the act of Parliament in that behalf (*d*) the estate and interest of the said bankrupt in the said —— and hereditaments have become, and now are, vested in the said [*three assignees*] as such assignees as aforesaid; *AND WHEREAS there is now owing to the said [*mortgagee*], for principal and interest (*e*) on the hereinbe-

Recitals.

—of fiat in bankruptcy.

[*566]

—Of amount of monies due on mortgage.

(*d*) *Vide* stat. 1 & 2 Wm. 4, c. 56, s. 26, stated in the "*Errata et Addenda*," prefixed to Vol. 8, *post*.

As to mortgagees' of bankrupts claim to interest.

(*e*) The mortgagee of a bankrupt's estate is entitled to interest out of the proceeds of the mortgaged property up to the time of payment, but if the security is inadequate to pay the full amount of principal and interest, and he claims to prove the deficiency as a creditor against the estate, he stands, with respect to that claim, on an equal footing with the other general creditors, and consequently his interest runs only to the period of the bankruptcy. Where the assignees, apprehending the estate to be more than adequate to pay the mortgage debt, take upon themselves the sale of the property, they either sell it free from the mortgage debt, which they pay off out of the purchase-money, or sell the equity of redemption only, and then the payment or continuance of the mortgage debt is matter of arrangement between the purchaser and mortgagee. If the mortgage is paid off by the purchaser, he would of course take the conveyance from the mortgagee and the assignees, by the same deed, unless the mortgage was for a term, which it is deemed advisable to keep on foot. Sir Edward Sugden recommends, or rather, before the late general bankrupt act, did

fore recited indenture of mortgage, the sum of 1600*l.* AND WHEREAS the premises comprised in the said indenture of mortgage were, on the —— day of —— last, put up for sale by public auction by the said [*three assignees*], at the Auction Mart in Bartholomew Lane in the city of London, in —— lots, according to certain printed particulars and conditions of sale; and at such sale the said [*purchaser*] became the highest bidder for, and was accordingly declared to be the purchaser of the hereditaments hereinafter released, being one of the said lots, at the price or sum of 500*l.*; And it hath been agreed by the said [*three assignees*], that the said sum of 500*l.* shall be paid by the said [*purchaser*] to the said [*mortgagee*] (*f*), in part satisfaction of his aforesaid mortgage debt; and the said [*mortgagee*] hath agreed to exonerate the said premises so purchased by the said [*purchaser*] from the whole of his said mortgage debt, and all interest due and to grow due thereon, and (*g*) to surrender the aforesaid term of five hundred years therein, in order to merge the same in manner hereinafter expressed. AND WHEREAS the said [*bankrupt*], at the request of the said [*three assignees*], hath agreed to join in these presents for the purposes hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in order to carry the said sale into effect, and (*h*) [for the considerations herein-

BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

—Of sale of premises by auction.

[*567]

Testatum.

For the consi-

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recommend, the assignees to sell the bankrupt's interest only, in order to avoid the auction duty. Sugd. Vend. 8th ed. 15. And this would still be a proper precaution, supposing that act not to have clearly exempted bankrupts' estates in mortgage from the duty; as to which, *vide ante*, p. 432.

(*f*) If part only of the purchase-money is paid to the mortgagee, and the residue to the assignees, this recital, and the statement in the *testatum* clause as to the payment of the money, will be varied accordingly; and for which see Precedent *ante*, p. 517.

(*g*) If the mortgage is in fee, say—

"to release and assure the same in manner hereinafter expressed."

(*h*) The bankrupt joins in the conveyance in order to guard against the event of the bankruptcy not being supported: the assurance ought therefore to be adapted to the nature of his interest, if it were unaffected by the bankruptcy. In the present case, as the bankrupt had a power of appointment under the ordinary uses to prevent dower, he is made, according to

Appointment by the bankrupt may be dispensed with.

BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

derations after mentioned bankrupt appoints to the uses after mentioned.

after mentioned, the said [*bankrupt*], by virtue and in execution of the power or authority reserved to him by the hereinbefore recited indentures of lease and release of the —— and —— days of ——, or one of them, and of all other powers and authorities whatsoever enabling him in this behalf, at the request, and by the direction, as well of the said [*mortgagee*] as of the said [*assignees*], testified by their severally executing these presents, by this present deed or writing, under his hand and seal, executed in the presence of, and attested by the two credible persons whose names are indorsed hereupon as witnesses attesting the execution thereof by him the said [*bankrupt*], *Doth* direct, limit, and appoint that all and singular the —— and hereditaments hereinafter described, and intended to be hereinafter granted and released, with the appurtenances, shall henceforth remain

[*568] *and be, and that the said indentures of the —— and —— days of —— shall henceforth, as to the same premises so purchased by the said [*purchaser*] as aforesaid, operate and enure to the uses, and upon and for the trusts, intents, and purposes hereinafter declared concerning the same.

Further *testatum.*

In consideration of purchase money paid to mortgagee, he surrenders, and assignees and bankrupt release.

AND THIS INDENTURE ALSO WITNESSETH, that,] in consideration of the sum of 500*l.* of lawful money &c. paid to the said [*mortgagee*] by the said [*purchaser*] at or immediately before the execution of these presents, at the request and by the direction of the said [*three assignees*], and with the privity and consent of the said [*bankrupt*], testified by their severally executing these presents, the receipt of which said sum of 500*l.* in part satisfaction of his said mortgage debt, and in exoneration of the —— and hereditaments hereinafter described and intended to be hereby conveyed, from the whole of the same mortgage debt, the said

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the usual practice, to exercise this power, and also convey by lease and release; but the appointment in such a case frequently is, and may very properly be omitted, because the great probability is, that the bankrupt has no power or estate in him, the bankruptcy being established; and even if it were not, the lease and release would be quite sufficient to vest his whole estate in the purchaser. If the appointment be dispensed with, the clause within brackets should be omitted. The bankrupt's dower-trustee is not made a party in the precedent in the text, though, of course, the bankruptcy does not affect *his* estate.

BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

[*mortgagee*] doth hereby acknowledge, and therefrom absolutely doth release and discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns; and the payment of which same sum of 500*l.* by the said [*purchaser*] in full for the absolute purchase of the inheritance in fee-simple in possession of and in the same premises, the said [*three assignees*], as such assignees as aforesaid, and also the said [*bankrupt*], do respectively hereby acknowledge, and therefrom do absolutely release and discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns; and in consideration of the sum of 10*s.* a-piece of such lawful money as aforesaid to the said [*three assignees*] and [*bankrupt*] paid by the said [*purchaser*] upon or immediately before the execution of these presents, (the receipt, &c.), the said [*mortgagee*], to the intent that the residue now unexpired of the said term of 500 years so created as hereinbefore mentioned in the —— and hereditaments hereinafter described, and intended to be hereby conveyed, and all other his term or estate therein, may be merged and extinguished in the freehold and inheritance of the same premises, at the request and by the direction as well of the said [*three assignees*] *as of the [*569] said [*bankrupt*], testified as aforesaid, *Doth* (*i*), by these presents surrender and yield up (*k*), and the said [*three assignees*], as such assignees of the said [*bankrupt*] as aforesaid, so far as they lawfully can or may, *Do*, and each of them *Doth* bargain, sell, and release; And the said [*bankrupt*] *Doth* grant, bargain, sell, release, and confirm, unto the said [*purchaser*] and his heirs, (in the actual possession (*l*) &c.): ALL THAT, &c., *(describe parcels)*, which Parcels.

(*i*) It is more usual, and perhaps rather more correct, to put the surrender after the release, *ut ante*, p. 517, but it is quite immaterial as to legal effect.

(*k*) If the mortgage is in fee, say—

"The said [*mortgagee*], at the request and by the direction, &c., *(ut supra in the text)*, *Doth*, by these presents, bargain, sell, and release."

(*l*) The lease for a year will be by the assignees and bankrupt, and, if the mortgage is in fee, the mortgagee also. As to joining the termor-mortgagee, *vide ante*, p. 518.

BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

said premises are part of the hereditaments comprised in the hereinbefore recited indentures of lease and release of the —— and —— days of ——, and the indenture of demise or mortgage of the —— day of ——, together with all ways, &c., *(general words)*; AND all the estate, right, title, interest, property, possession, equity of redemption, benefit, claim, and demand whatsoever, at law and in equity, of them the said [*mortgagee*], [*three assignees*], and [*bankrupt*] respectively, in, to, or out of the same premises, and every or any part thereof, *(Habendum to uses to prevent dower,* ut ante, p. 461): AND the said [*mortgagee*] and [*three assignees*] for themselves respectively, and for their respective heirs, executors, and administrators, but each of them so far as regards his own respective acts and defaults only, hereby respectively covenant and declare with and to the said [*purchaser*] and his heirs, that they the said [*mortgagee*] and [*three assignees*] have not, nor have or hath any or either of them, at any time heretofore, made, done, or committed, or knowingly suffered, any act, deed, matter, *or thing whatsoever, by means whereof the said —— and premises hereinbefore [appointed], surrendered (*m*), and released, or intended so to be, or any part thereof, are, is, can, shall, or may be incumbered, or otherwise prejudicially affected in any manner whatsoever. AND the said [*bankrupt*] *Doth* hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, in manner following, (that is to say), that (notwithstanding any act, deed, matter, or thing whatsoever, by him the said [*bankrupt*], or any person or persons lawfully claiming from, through, under, or in trust for him or them (*n*), made, done, committed,

All the estate.

Covenant by mortgagee and assignees against incumbrances.

[*570]

Covenant by bankrupt;

—that notwithstanding any act &c., the conveying parties are lawfully seised;

(*m*) If the mortgage is in fee, omit this word here, and throughout the covenants for title.

As to referring to the acts of trustees &c. in the covenants for title.

(*n*) The practice of conveyancers seems to be various, as to referring in this place expressly to the acts of persons who concur in the conveyance as trustees or incumbrancers, by the direction of the vendor. Some gentlemen omit them here, but refer to them at the end of the covenant for quiet enjoyment, and also of the covenant against incumbrances; others, again, refer to them in the latter, but not in the former covenant; while other practitioners omit them altogether, referring only in general terms

executed, or suffered to the contrary), [the said [*mortgagee*], [*three assignees*], and [*bankrupt*], or some of them now are, or one of them is, seised of the said —— and premises hereinbefore [appointed (*o*) and] released, or intended so to be, *with the appurtenances, for an absolute and indefeasible estate of inheritance in fee-simple in possession, or with an absolute power of appointment over the inheritance in fee-simple in possession of and in the same premises; *And* that, (notwithstanding any such act, deed, matter, or thing as aforesaid), they (*p*)] the said [*mortgagee*], [*three assignees*], and [*bankrupt*], or some of them, now have in themselves, or one of them hath in himself, full power and lawful and absolute authority to limit, appoint, surrender, release, and confirm the said —— and premises hereinbefore appointed, surrendered, and released, or intended so to be, with the appurtenances, to the uses and in manner aforesaid, and according to the true intent and meaning of these presents; *And* that the same —— and premises, with the appurtenances, shall henceforth go, remain, and be to the uses, and upon the trusts hereinbefore declared concerning the same, and shall accordingly, at all times for ever hereafter, be held and enjoyed, and the rents and profits thereof be received and taken, without any disturbance or interruption whatsoever

BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

[*571]

—have power to convey.

That premises shall remain to uses aforesaid.

throughout all the covenants to the acts of the covenantor and persons claiming under him, or any other person to whose acts the covenant extends. All seem to agree in not introducing the mention of the parties in question in the covenant for further assurance. Perhaps, the true distinction is this: if the estates of the trustees or incumbrancers were created by the vendor himself, or by any person to whose acts his covenants extend, it is unnecessary to specify them, as they will be included in the general terms of the covenant; but, if such estate do not fall within the scope of the covenants, then the persons in question ought to be referred to *nominatim*. This, however, rarely happens, and therefore the point is not very material. Correctness, it is obvious, requires that all the covenants should be co-extensive; and there seems to be no reason why the names of these concurring parties, if inserted in the other covenants, should be omitted in the covenant for further assurance; they should be named in the whole or in none.

(*o*) If the appointment by the bankrupt is omitted, the reference to it should also be omitted throughout the covenants.

(*p*) This covenant may be very properly omitted.

BY MORTGAGEE, ASSIGNEES, AND BANKRUPT. —free from incumbrances.

from or by the said [*bankrupt*], or any person or persons lawfully claiming from, through, under, or in trust for him or them; *And that* free and clear, and freely and clearly exonerated and discharged, or otherwise by him the said [*bankrupt*], his heirs, executors, or administrators, effectually saved harmless and kept indemnified from and against all and all manner of former and other estates, rights, titles, charges, and incumbrances whatsoever, made, done, executed, or suffered by the said [*bankrupt*], or any other person or persons lawfully claiming from, through, under, or in trust for him; *And moreover*, that the said [*bankrupt*] and his heirs, and every person lawfully claiming by, from, through, under, or in trust for him or them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, make, do, acknowledge, levy, suffer, and execute, all such further lawful and reasonable acts, deeds, conveyances, and assurances whatsoever, for the more effectually conveying *and assuring the same —— and premises, or any part thereof, with the appurtenances, to the uses and in manner aforesaid, and according to the true intent and meaning of these presents, as by him the said [*purchaser*], his appointees, heirs, or assigns, or his or their counsel in the law, shall be advised and required; AND WHEREAS, at the sale by public auction hereinbefore referred to, one of the conditions of the said sale was, that the purchaser of the largest of the several lots sold at the said sale should have the custody of the title deeds relating to the same several lots, and should enter into a covenant for the production thereof with the purchasers of the other lots; AND WHEREAS the said [A. B.] was the purchaser of the largest of the said lots, and accordingly the said title deeds have been delivered to him pursuant to the said condition of sale. NOW THIS INDENTURE ALSO WITNESSETH, that, in conformity with the said recited condition of sale, and in consideration of the premises, the said [A. B.] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns (*q*), that he the said [A. B.], his heirs,

—and for further assurance.

[*572]

Recital of condition of sale, that the largest purchaser should have the custody of the deeds.

Covenant by largest purchaser for production of deeds.

Whether cove-

(*q*) An important question which will occur to the learned reader in

executors, administrators, and assigns, shall and will, from time to time, and at all times hereafter, unless prevented

BY MORTGAGEE, ASSIGNEES, AND BANKRUPT.

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regard to this covenant, is, whether it would run with the land. Sir J. *Leach*, M. R., seems to have thought that it would; (*vide ante*, p. 375); or, at least, that such would be the effect if the covenant were by a purchaser with his vendor, who had parted with the deeds, but retained part of the estate. Such a case, indeed, seems to be wholly undistinguishable in principle from the present; for, in regard to the land *not sold*, to which alone the covenant in question relates, the parties are strangers to each other. The doctrine, then, of the learned Judge, would seem to involve the conclusion, that a covenant entered into *by a stranger* with the owner, respecting the land, runs with it. If such a general proposition could be maintained, it would go far towards overturning some of the notions which have obtained in the profession respecting covenants running with the land. According to these notions, privity of estate must subsist between the covenanting parties, for which purpose it has been deemed essential that the covenantor and covenantee should stand in the relation of grantor and grantee of the lands to which the covenants relate; but what *privity of estate*, it may be asked, subsists between the parties in such a case? As applied to the relation of reversioner and lessee, the term has a clear and intelligible meaning, but has no very obvious application to the case of a grantor who parts with his whole estate, and who ceases to have an interest in, and is therefore a stranger to, the land at the instant that it vests in the grantee. In support of the hypothesis in question, much stress has been laid on what fell from Lord *Kenyon* in *Stokes* v. *Russell*, 3 D. & E. 402, where his Lordship says—"It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, *there must be privity of estate between the covenanting parties.*" But it is to be observed, that the question before the Court in this case was not, whether a covenant entered into *by* a stranger with a person having an estate in the land, could run with it, but whether a covenant by a lessee *with* a stranger to the reversion, was annexed to that reversion. The fact was, that a mortgagor and mortgagee had joined in granting a lease, and the lessee's covenants were made with the mortgagor, who had no estate, and which were therefore held to be, as they obviously were, covenants in gross. Lord *Kenyon's* continuing remarks are explicitly pointed to such a case:—"The covenantee," said his Lordship, "had no interest in the land of which a Court of law could take notice, though he had an equity of redemption, an interest which a Court of equity would take notice of. These, therefore, were collateral covenants. And though a party may covenant with a stranger to pay a certain rent in consideration of a benefit to be derived under a third person, yet such a covenant cannot run with the land."

nant by stranger will run with the land.

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Positions of Lord *Kenyon* and Lord *Coke* on the point examined.

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by fire, or some other inevitable accident, upon the request, and at the costs and charges of the said [*purchaser*], his

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The case, therefore, (and the *dictum* must be taken *secundum subjectam materiam*), left wholly untouched the doctrine respecting the annexation to the land of covenants entered into by a stranger with the owner of the land. One of the cases put by Lord Coke as an instance of a covenant running with the land, is certainly of this description:—"A., seised of the manor of D., whereof a chappell was parcell, a prior, with the assent of his convent, covenanteth by deed indented with A. and his heires to celebrate divine service in his said chappell weekely, for the lord of the said mannor, and his servants, &c. *In this case the assignees shall have an action of covenant*, albeit they were not named, *for that the remedie by covenant doth runne with the land*, to give dammages to the partie grieved, and was in a manner appurtenant to the mannor†. But if the covenant had been with a stranger to celebrate divine service in the chappell of A. and his heires, there the assignee shall not have an action of covenant; for the covenant cannot be annexed to the mannor, because the covenantee was not seised of the mannor." Co. Litt. 384. b.

In this case, it is clear, there was no privity of estate (using that term in the sense which, in the cases under consideration, has been given to it) between the prior and the lord of the manor; and the reason assigned by the very learned commentator for the distinction between the two cases which he puts in opposition, shews that he considered it sufficient that the covenant was with the owner of the land, respecting the land. The whole difference is made to consist in the covenantee being or not being seised of the manor, without regard to the relative character of the covenantor. We have, therefore, the high authority of Lord *Coke*, uncontradicted, I believe, by decision, though certainly opposed by the current of professional opinion, in favour of the doctrine in question; and when to this is added the weighty consideration of convenience, (which would seem obviously to demand that covenants relating to the land, *by whomsoever made*, should accompany the land), we may well entertain a doubt whether the Courts would not now hold that covenants for title, to produce title deeds, and all other covenants capable in their nature of running with the land, if made with any person having an estate in the land, would be annexed to that estate in the hands of an alienee. If this general doctrine were established, it would render inapplicable some of the distinctions and suggestions which have been the subjects of consideration in preceding notes, but to what extent such effect would be produced, it might perhaps, in some cases, be rather difficult to determine. While, however, the prin-

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† 2 H. 4, 6, *Hen. Horne's* case; 6 H. 4, 1, Lib. 5, fol. 17, 18, *Spencer's* case.

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appointees, heirs, or assigns, produce and shew, or cause or procure to be produced and shewn unto the said [*purchaser*], his appointees, heirs, or assigns, or to his or their or any or either of their counsel, attornies, solicitors, or agents, or at any trial or hearing, commission or examination in or directed by any Court or Courts of law or equity, or other Court of judicature in the *United Kingdom, or otherwise, as often as occasion shall require, all and singular or any or either of the deeds, instruments, and writings specified in the schedule hereunder written, for the purpose of manifesting and defending the title or possession of him the said [*purchaser*], his appointees, heirs, or assigns, in or to the said —— and premises hereby assured, or any part thereof; and shall and will, unless so prevented as aforesaid, at the like request, costs, and charges of the said [*purchaser*], his appointees, heirs, or assigns, deliver to him or them any abstract or abstracts, copy or copies, such copy or copies to be attested if required, of all or any of the said deeds, instruments, and writings; and shall and will permit and suffer the said [*purchaser*], his appointees, heirs, or assigns, to compare and examine the same with the originals (*r*). IN WITNESS, &c.

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And to deliver copies.

THE SCHEDULE referred to in the preceding indenture.

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cipal question remains unsettled, it would be premature to discuss subordinate points; and it should be borne in mind, that, whatever opinion is entertained upon the subject, prudence requires that we do not forego any precaution which the contrary hypothesis would render necessary. Covenants, therefore, which are intended to run with the land, should, when it is practicable, be so framed as that they may, upon principles acknowledged by all, clearly have this effect.

Whether covenantee ought to be allowed to take copies.

(*r*) A permission to *take* copies is frequently contended for on the part of the proposed covenantee, and the argument urged in support of this claim is, that, if the covenant was silent on the subject of the copies altogether, he would be entitled, under the covenant for production simply, to have the deeds produced, and, when produced, might abstract or transcribe them. The covenant, however, is more frequently framed as in the precedent in the text, *i. e.* extending to the *delivery* of copies only. Where this restriction is submitted to, the covenantee ought at least to be allowed to ascertain the accuracy of the copy or abstract delivered, by his

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own examination; and, therefore, such a permission has been introduced. For precedents of covenants for production of title deeds generally, and the various restrictions introduced into them, *vide ante*, Vol. 4, p. 10, *et seq.* The present covenant is absolute, and not defeasible upon the covenantor parting with the deeds, and procuring a similar covenant from the person to whom he delivers them, because the conditions of sale provide for no such qualification of the covenantor's liability.

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BY INSOLVENT DEBTOR, HIS ASSIGNEE, AND ANNUITANT.

CONVEYANCE *in Fee by the* ASSIGNEE *of an* INSOLVENT DEBTOR (*a*), *in which the* INSOLVENT *and the* GRANTEE *of a* REDEEMABLE ANNUITY *join.* SURRENDER *of* TERM *by* ANNUITANT'S TRUSTEE.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*assignee*], of &c., of the first part; [*annuitant*],

Stat. 7 Geo. 4, c. 57, s. 20, as to sales by assignees of insolvent debtors.

(*a*) The last General Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 20, enacts "That the assignee or assignees of the estate and effects of any prisoner shall, with all convenient speed, after his or their accepting such conveyance and assignment as aforesaid, use his or their best endeavours to receive and get in the estate and effects of such prisoner, and shall, with all convenient speed, make sale of all such estate and effects; and if such prisoner shall be interested in or entitled to any real estate, either in possession, reversion, or expectancy, such real estate, within the space of six months after the conveyance and assignment made to such assignee or assignees in that behalf, or within such other time as the said Court shall direct, shall be sold by public auction, in such manner, and at such place or places, as shall, thirty days before any such sale, be approved, in writing under their hands, by the major part in value of the creditors of such prisoner entitled to the benefit thereof, who shall meet together on notice of such meeting, published fourteen days previous thereto in the London Gazette, and also in some daily newspaper printed and published in London or within the bills of mortality, if the prisoner before his or her going to prison resided in London or within the bills of mortality; and if such prisoner resided elsewhere within the United Kingdom, then, in some printed newspaper which shall be generally circulated in or near the place where such prisoner resided at the time aforesaid; and in case such prisoner shall be entitled to any copyhold or customary estate, the con-

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of &c., of the second part; [*annuitant's trustee*], of &c., of the third part; [*insolvent*], of &c., of the fourth part; [*purchaser*], of &c., of the fifth part; and [*purchaser's trustee*], of &c., of the sixth part: WHEREAS the said [*insolvent*] being seised to him and his heirs of the hereditaments hereinafter described, and hereby intended to be assured, by indenture of grant and demise bearing date on or about the —— day of ——, made between the said [*insolvent*], of the first part; the said [*annuitant*], of the second part; and the said [*annuitant's trustee*], of the third part; in consideration of the sum of 1000*l.* then paid by the said [*annuitant*] to the said [*insolvent*], the said [*insolvent*] granted to the said [*annuitant*], his executors, administrators, and assigns, an annuity or yearly rent-charge of 100*l.*, charged upon and issuing and payable out of the —— and hereditaments here-

Recitals.

—Of grant of redeemable annuity.

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veyance and assignment by such provisional assignee to such assignee or assignees as aforesaid shall be entered on the Court rolls of the manor of which such copyhold or customary estate shall be holden; and thereupon it shall be lawful for such assignee or assignees to surrender or convey such copyhold or customary estate to any purchaser or purchasers of the same, from such assignee or assignees as the said Court shall direct; and the rents and profits thereof shall be in the meantime received by such assignee or assignees for the benefit of the creditors of such prisoner, without prejudice, nevertheless, to the lord or lordsof the manor of which any such copyhold or customary estates shall be holden."

Leasehold estates not within the section of the act directing the sale by auction, &c.

Considerable doubts existed whether the provision of the act directing the sale to be by auction, &c. applied to leaseholds; for, though they do not strictly fall under the denomination of "real estate," it was thought that the enactment must have been intended to extend to them, and that the Courts, influenced by this consideration, might possibly hold the term "real estate" to comprehend *chattels* "real;" but the question has been set at rest by a recent case, which has decided that leaseholds are not within this clause of the act. *Waldron* v. *Howell*, 3 Russ. 376. The bill in this case was filed by an insolvent's assignee, to set aside a sale by private contract, which had been made by his predecessor in office, of the equity of redemption in a leasehold property, to a mortgagee, in consideration of the mortgage-money, charging fraud, and that the sale was contrary to the stat. 53 Geo. 3, c. 102, s. 19, the insolvent act then in force, (the terms of which, in regard to this point, correspond in substance with those of the present act); but the Court decided against the plaintiff on both grounds.

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inafter described, and intended to be hereby assured; *To hold* the same annuity unto the said [*annuitant*], his executors, administrators, and assigns, for the term of ninety-nine years, if three several persons therein named (all of whom are now living), or any or either of them, should so long live; such *annuity to be payable quarterly, on &c., *(name days of payment)* and a proportion for any fractional period of a quarter which might happen to precede the expiration thereof; And by the same indenture the said [*insolvent*], on the nomination of the said [*annuitant*], demised to the said [*annuitant's trustee*], his executors, administrators, and assigns, all and singular the said —— and hereditaments thereinbefore charged with the payment of the said annuity, with the appurtenances; *To hold* the same unto the said [*trustee*], his executors, administrators, and assigns, for the term of 100 years thence next ensuing, upon certain trusts, for securing the payment of the said annuity of 100*l.* as therein particularly mentioned; And in the said indenture was contained a power enabling the said [*insolvent*], his heirs, executors, administrators, or assigns, at any time or times thereafter, to re-purchase the said annuity, on giving seven days' notice to the said [*annuitant*], his executors, administrators, or assigns, and paying to him or them the sum of 1025*l.*, with all arrears of the said annuity, together with a proportional part thereof, up to the time of such re-purchase: AND WHEREAS, under or by virtue of the provisions of an act of Parliament made and passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled "An act to amend and consolidate the laws for the relief of insolvent debtors in England," the said [*insolvent*], being then in custody for debt, applied by petition to the Court for the Relief of Insolvent Debtors, praying to be discharged under the provisions of the said act: AND WHEREAS, by an indenture bearing date on or about the —— day of ——, made between the said [*insolvent*], of the one part; and [*provisional assignee*], of &c., the provisional assignee of the estates of insolvent debtors in England, of the other part; the said [*insolvent*] did convey unto the said [*provisional assignee*] his successors and assigns, all the estate, right, title, interest, and trust of the said [*insolvent*] in and to *(inter alia)* the real estate, of the

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—of insolvent having taken the benefit of the act.

—of conveyance by insolvent to provisional assignee.

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said [*insolvent*], and all deeds, evidences, and writings concerning the same; *To hold* the same unto the said [*provisional assignee*], his successors and assigns, in trust, nevertheless, for the use and benefit of the creditors of the said [*insolvent*], who should be entitled to share in a dividend of the said estate and effects *under the provisions of the [*579] said act, and for other the purposes in the said act expressed; And whereas, upon the hearing of the petition of the said [*insolvent*], the said Court adjudged him to be entitled to the benefit of the said act: And whereas, by an indenture bearing date on or about the —— day of ——, made between the said [*provisional assignee*] of the one part, and the said [*assignee*] of the other part, after reciting the lastly hereinbefore recited indenture, the said [*provisional assignee*], in obedience to an order of the said Court, did convey unto the said [*assignee*] and his heirs all the real estate which by virtue of the said hereinbefore recited indenture then was in any way vested in the said [*provisional assignee*], as such provisional assignee as aforesaid, with the appurtenances, *To hold* the same unto the said [*assignee*] and his heirs, in trust for the creditors of the said [*insolvent*], and for other the purposes in the thereinbefore recited indenture expressed concerning the same (*b*):

—of conveyance by provisional assignee to permanent assignee.

(*b*) None of the General Insolvent Acts prescribed any form for the conveyance of the estates of the insolvent from the provisional to the permanent assignee; but the officers of the Court were in the habit of using the same form which the act directed to be adopted in the conveyance from the insolvent to the provisional assignee. It was, however, fairly objected to such conveyances, that, the statute having simply directed the provisional assignee to convey, the conveyance ought to be made by lease and release, or some other assurance appropriate to his estate, and that the deed of grant or conveyance in question (not being enrolled, preceded by a lease for a year, or accompanied by livery of seisin) was ineffectual for this purpose. The objection was found to be insuperable; and, accordingly, the recent statute of 1 Wm. 4, c. 38, amending some provisions in the Insolvent Debtors' Act, contains an enactment, giving validity to the conveyances antecedently made, and prescribing a form for future adoption. The act (sect. 7) provides that "every conveyance and assignment hereafter to be made and executed by the provisional assignee for the time being to any other assignee or assignees, by virtue of any order of the said Court, shall be in such form as is to this act annexed; and that every

As to the conveyance from the provisional to the permanent assignee.

Stat. 1 Wm. 4, c. 38.

Conveyance by provisional assignee to be in the form annexed, and all con-

—Of the resolution of creditors, that the real estate should be sold by auction.

And whereas the said [*assignee*], in obedience to the provisions of the hereinbefore mentioned act, convened a

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veyances heretofore executed to be valid.

such conveyance and assignment, and also every conveyance and assignment at any time heretofore made and executed by the provisional assignee for the time being, in obedience to any order of the Court for Relief of Insolvent Debtors, shall be deemed and taken to be valid and effectual to all intents and purposes whatsoever, and fully and effectually to vest and to have vested all and every estate and estates, real and personal,

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and all and every right, title, interest, and trust, in and to the same, of what nature or kind soever, to which the insolvent debtor in each case respectively shall or may be, or shall or may have been entitled in any manner, or by any means whatsoever, or which such insolvent debtor shall or may be, or shall or may have been required by law to convey and assign in trust for his or her creditors.

"SCHEDULE TO WHICH THIS ACT REFERS.

"*Form of Conveyance and Assignment by the Provisional Assignee.*

Form of conveyance prescribed by the act.

"THIS Indenture, made the —— day of ——, in the year of our Lord ——, between ——, provisional assignee of the estate and effects of insolvent debtors in England, of the one part, and ——, of the other part: Whereas, by indenture, bearing date the —— day of ——, between ——, an insolvent debtor, then a prisoner in the ——, of the one part; and the said ——, such provisional assignee as aforesaid, of the other part: all the estate, right, title, interest, and trust of the said insolvent debtor in and to all the real and personal estate of the said insolvent debtor in possession, reversion, remainder, or expectancy, except the wearing apparel and other such necessaries of the said insolvent debtor and family, not exceeding in the whole the value of 20*l.*, were, among other things, conveyed and assigned to the said —— as such provisional assignee as aforesaid, his successors and assigns. Now this indenture witnesseth, that, in obedience to an order of the Court for Relief of Insolvent Debtors, he the said ——, at the request and with the consent of the said ——, testified by —— sealing and delivering these presents, hath conveyed, assigned, transferred, and set over unto the said ——, his heirs, executors, administrators, and assigns, all the estate, right, title, interest, and trust, of, in, and to all the real and personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, present and future, which, by virtue of the said hereinbefore in part recited indenture, now are in any way vested in the said —— as such provisional assignee as aforesaid, together with their and every of their rights, members, and appurtenances; to have and to hold, receive, and take, all and every the said estate, effects, and premises, and every part thereof, conveyed, assigned, transferred, or set over, or

meeting of the creditors of the said [*insolvent*] on the —— day of ——, by notice in the London Gazette, and the

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mentioned, or intended to be hereby conveyed, assigned, transferred, or set over, with their and every of their rights, members, and appurtenances, unto the said ——, his heirs, executors, administrators, and assigns, according to the respective natures, properties, and tenures thereof; in trust, nevertheless, for the use, benefit, and advantage of the creditors of the said insolvent debtor who shall be entitled to share in the dividend of the said estate and effects, and to and for such other uses, intents, and purposes, and in such manner and form, as are in and by the said indenture expressed of and concerning the same, and to and for no other use, intent, or purpose whatsoever. In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

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Signed, sealed, and delivered by the said ——, in the presence of ——.

Signed, sealed, and delivered by the said ——, in the presence of ——."

The act also contains the following useful provision, which is sufficiently explained by the recital:—

Court may order provisional assignee to join in conveyances in certain cases.

Sect. 5. 'And whereas it may often happen that some interest in lands and tenements may become vested in the provisional assignee of the said Court, which appears to be of no value to creditors; but, nevertheless, it may be reasonable and expedient that the said provisional assignee should make, or join in making, some conveyance or assignment of the same, and that the same should be done without the expense attending the advertisements and meetings of creditors, as prescribed by the said first-mentioned act, in certain cases;' it is therefore enacted, "That it shall and may be lawful for the said Court, at any time after the day gazetted for the hearing of the matters of the petition of any insolvent debtor, if no creditor shall have become assignee of his or her estate or effects; and if it shall appear fit, upon such notice given by advertisement or otherwise to the creditors, or any of them, as the said Court shall in any case direct, to order the provisional assignee to make or join in any conveyance or assignment of any such interest as to the said Court may appear just and reasonable, without observing the provisions of the said first-mentioned act as to the sale of real property by the provisional or other assignees of the estates of insolvent debtors."

Conveyances already made declared valid.

Sect. 6. "And it is further declared and enacted, that all assignments and conveyances heretofore made, or to be made, by such provisional assignee in any such cases, by order of the said Court, shall be, and the same are hereby declared to be, good and valid, to all intents and purposes."

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newspaper called the ——, published and circulated at ——, where the said [*insolvent*] resided previously to his imprisonment, which notice appeared in the Gazette and newspaper respectively, on the —— day of ——, and at such meeting the major part in value of the creditors of the said [*insolvent*] then present, by writing under their hands, resolved, approved, and directed that the real estate of the [*582] said [*insolvent*] should be sold by auction at the *—— Inn, in the city of ——, on the —— day of ——, (being more than thirty days after the holding of such meeting), in such lots as the said [*assignee*] should think proper; AND WHEREAS, pursuant to the resolution of the said creditors, and in obedience to the provisions of the said act, the said [*assignee*] caused the hereditaments hereinafter described, and intended to be hereby released (with other part of the real estate of the said [*insolvent*]) to be put up to sale by public auction, at the said —— Inn, in the city of —— aforesaid, on the —— day of —— now last past, in several lots; And the said [*purchaser*] attended at the said auction, and, being the highest bidder for, was declared the purchaser of, the said hereditaments hereby released, and the inheritance in fee-simple thereof, free from all incumbrances (*c*), at the

—Of sale by auction pursuant to resolution.

Unnecessary to state payment of the deposit.

(*c*) Some practitioners recite the payment of the deposit to the auctioneer, but, as this is a mere temporary arrangement, and does not at all interfere with the ultimate destination of the money, it seems better not to notice it in the conveyance. The recital in the text, it will be seen, details with particularity the proceedings respecting the sale, for the purpose of shewing that the sale was conformable to the act. This seems, in general, to be advisable, but of course is not essential to the validity of the sale. Where, for the sake of brevity, it is wished to condense the recital, it may be shortly expressed thus:—

Shorter recital of sale by auction.

"AND WHEREAS the said [*assignee*], pursuant to the provisions of the hereinbefore-mentioned act, offered the hereditaments hereinafter described and hereby released (being part of the real estate of the said [*insolvent*]) for sale by public auction, at the —— Inn &c., on the —— day of —— last; and at such auction the said [*purchaser*] became the purchaser thereof in fee-simple, free from all incumbrances, at the sum of £——."

If the sale be of leaseholds, as they are not within the section of the act

price or sum of £—— (*d*); AND WHEREAS the said [*insolvent*], at the request of the said [*assignee*] and [*purchaser*], hath agreed to join in the assurance hereby made, and to enter into the covenants on his part hereinafter contained (*e*); AND WHEREAS the said annuity of 100*l.*, granted to the said [*annuitant*] by the hereinbefore recited indenture, is in arrear, and there is now owing to him for such arrears, up to the day of the date of these presents, the sum of 75*l.*; AND WHEREAS it has been agreed that the said sum of 75*l.*, and also the sum of 1025*l.*, being the price or sum to be paid for the re-purchase or redemption of the said annuity, according to the proviso contained in the hereinbefore recited indenture (*f*), (which several sums of 75*l.* and 1025*l.* make together the sum of 1100*l.*,) shall be paid to the said [*annuitant*] out of the said purchase-money or sum of 1500*l.* NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 1100*l.* of &c. paid by the said [*purchaser*] to the said [*annuitant*] at or immediately before the execution of these

—That insolvent has agreed to join in conveyance,

—of sum due to the annuitant.

—That annuitant is to be paid off out of the purchase-money.

Testatum.

In consideration of purchase-money paid to annuitant and assignee, they

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requiring a sale by auction, &c., it will be sufficient to notice the contract for sale in general terms, without referring to the mode of sale. Where a sale *by auction* is requisite, it seems advisable to keep a copy of the printed particulars of sale.

(*d*) If the assignee sells the estate free from incumbrances, and pays the redemption price of the annuity out of the purchase-money, the *ad valorem* duty is of course payable on the whole purchase-money; but, if the sale is *subject* to the annuity, the duty only attaches to the actual purchase-money, exclusively of the redemption price of the annuity; for, the act contains no clause applicable to redeemable annuities, similar to that which applies to mortgages, which, whether paid off or not, are considered as forming part of the purchase-money.

Ad valorem duty not payable on re-purchase-money of annuity.

(*e*) It is usual to require the concurrence of the insolvent, but there seems to be no power to compel him to join, and his non-concurrence would clearly be no objection to the title;—his covenants for title are commonly of very little value, and therefore may be properly omitted.

As to the insolvent concurring in the conveyance.

(*f*) Unless the deed were executed on one of the quarterly days of payment, a proportion of the annuity for the fractional period of the current quarter would also be payable to the grantee under the proviso for re-purchase.

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and insolvent release, and trustee of term surrenders to purchaser.

presents, at the request and by the direction of the said [*assignee*], testified by his executing these presents, (being in full for the absolute re-purchase and redemption of the said annuity as aforesaid), *And also*, in consideration of the further sum of 400*l.* at the same time paid by the said [*purchaser*] to the said [*assignee*], the receipt and payment of which said several sums of 1100*l.* and 400*l.* (making together the said purchase-money or sum of 1500*l.*) they the said [*annuitant*] and [*assignee*] do hereby respectively acknowledge, and therefrom do absolutely discharge the said [*purchaser*], his appointees, heirs, executors, administrators, and assigns, *for ever, by these presents; *And also* in consideration of the sum of 10*s.* of like lawful money at the same time paid by the said [*purchaser*] to each of them the said [*insolvent*] and [*trustee of term*], (the receipt whereof is hereby acknowledged), he the said [*assignee*], according to his estate, right, title, and interest, (as such assignee as aforesaid), with the privity and approbation of the said [*insolvent*], testified by his executing these presents, *Doth* hereby bargain, sell, and release; And the said [*insolvent*] *Doth* grant, bargain, sell, release, and confirm; And the said [*trustee of term*], at the request and by the direction of the said [*annuitant*], testified as aforesaid, and to the intent that the residue of the said term of 99 years created by the hereinbefore recited indenture of the —— day of ——, and all other the term and estate of the said [*trustee of term*] may be merged and extinguished, *Doth* assign, surrender, and yield up; And the said [*annuitant*] *Doth* remise, release, and quit claim unto the said [*purchaser*] and his heirs, (in the actual possession of the said [*purchaser*] now being by virtue of a bargain and sale (*g*) to him thereof made by the said [*assignee*] and [*insolvent*], in consideration, &c.) ALL THAT &c., *(parcels);* And all the estate, &c. of the [*assignee, insolvent, annuitant, and his trustee*]; And all deeds, &c.; *(Habendum to uses in favour of purchaser, to prevent dower,* ut ante, p. 461; *Covenants by*

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Parcels.

Habendum to uses.

(*g*) The immediate estate being in a termor, the lease for a year in this instance might safely be dispensed with.

assignee, annuitant, and his trustee, each for his own acts, &c., that they have done no act to incumber; Covenants for title by insolvent, similar to bankrupt's covenants in the last precedent, omitting only, if the insolvent does not make an appointment, the parts relating to the appointment in that precedent.)

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BARGAIN *and* SALE(*a*) *in* FEE *by* TENANT *in* TAIL, *making a Tenant to and declaring the Uses of, a* COMMON RECOVERY. *(Variation where the* WIDOW *of the deceased Owner joins in order to* RELEASE *her* DOWER).

BARGAIN AND SALE ENROLLED, FROM TENANT IN TAIL.

THIS INDENTURE, made the —— day of ——, BETWEEN [*vendor*], of &c., of the first part; [*tenant*], of &c., Parties.

(*a*) Bargains and sales enrolled are now little used as assurances from vendor to vendee, because they do not admit of the limitations usual in purchase deeds; for, as they operate simply by transferring the use to the bargainee from whom has moved a valuable consideration, it is obvious that uses cannot be raised under a power of appointment contained in a bargain and sale, since no valuable consideration could move from a person who at the time was unascertained, which, it is obvious, is the situation of an appointee until the execution of the appointment. A bargain and sale, however, is well calculated to answer the purpose of a recovery deed, whose object is merely to vest an estate of freehold in the tenant to the *præcipe*, and declare the uses of the recovery, (which uses take effect out of the seisin of the demandant or recoveror), and it has the advantage of being, by its enrolment, rendered matter of record. This is a material consideration, when the estate of which the recovery is suffered is about to be sold in lots, as the vendor avoids the necessity of furnishing attested copies, or covenanting for the production of the deed. The enrolment need not precede the recovery, but care should be taken that the statutory period of six lunar months is not allowed to elapse without its being done, as the recovery would in that case be void. The precedent of a mortgage by tenant in tail will be found to contain some useful variations, which are equally adapted to a sale; and the precedent in the text has been studiously framed to present as much diversity as possible. (*Vide ante*, Vol. 6, p. 63).

As to bargains and sales enrolled.

BARGAIN AND SALE ENROLLED, FROM TENANT IN TAIL.

of the second part (*b*); [*demandant*], of &c., of the third part; [*purchaser*], of &c., of the fourth part; and [*pur-*

As to common recoveries.

The most material point to be attended to, in regard to a common recovery by tenant in tail, is to ascertain that the immediate freehold is vested in the tenant; for this reason, a recovery should never be suffered for purposes of family arrangement, or otherwise, without a careful examination of the title, in order to ascertain that no such estate is left outstanding. If the inheritance, and not the immediate freehold merely, is in a third party, the recovery will not on this account be invalidated, but will take effect as a good equitable recovery; and such recoveries, it may be observed, are governed by the same general rules as those which regulate recoveries that operate upon the *legal* interest; thus, a recovery by an equitable tenant in tail in remainder, expectant on an estate for life, without the concurrence of such tenant for life, would be void for want of a good tenant to the *præcipe*. It was for a long period a disputed point in the profession, whether an equitable tenant in tail was competent to suffer a recovery, without the junction of his mortgagee; but the affirmative was decided without hesitation by Lord *Eldon*, in *Nouaille* v. *Greenwood*, 1 Turn. 26; and it is conceived upon the soundest principles. Where an equitable tenant in tail in remainder joins with a person having the immediate freehold in suffering a recovery, it is no objection to the validity of the recovery, that the latter interest is clothed also with the legal estate, but the converse of the proposition does not hold, for a recovery by the owner of the *equitable* freehold, in conjunction with the tenant in tail of the *legal* remainder, would not take effect as an equitable recovery. *Shapland* v. *Smith*, 1 B.C.C. 76†.

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Recovery by equitable freeholder and legal tenant in tail in remainder invalid.

Thus, if lands are limited to the use of A. for life, and after his decease to the use of B. and his heirs, in trust for C. and the heirs of his body, A. and C. might conjointly suffer a good equitable recovery; but, if the limitations were to the use of A. for the life of B., in trust for B., and after the death of B. to the use of C. and the heirs of his body, B. and C. could not, without the concurrence of A., suffer a valid recovery. The power, therefore, of acquiring the fee-simple by means of a recovery, seems to depend upon the discretion or caprice of A. the trustee, in giving or withholding his concurrence. In a late case in practice, where the trustee had an estate for the life of a married woman, in trust for her separate use, and also to preserve contingent remainders, and the remainders were limited to her first and other sons in tail, he refused to join with the *cestui que trust*

† See further as to Equitable Recoveries, *ante*, Vol. 1, p. 16; Vol. 3, p. 530, 2nd Edit.

chaser's trustee], of &c., of the fifth part: WHEREAS the said [*vendor*] is seised to him and the heirs of his body of the —— and hereditaments hereinafter described, and intended to be hereby assured (*c*): AND WHEREAS the

Recital of the vendor being tenant in tail, and the agreement for the purchase.

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and her eldest son, alleging that his doing so would be in violation of the trust to preserve the remainders. The objection, it is conceived, was untenable; but, as it was persisted in, and there was no power of compelling the junction of the trustee, the recovery could not be suffered. The duty of trustees in cases of this nature will probably be defined in the act by which fines and common recoveries may be expected shortly to be superseded by more simple assurances.

(*b*) If the dowress joins, make her the party of the third part.

(*c*) If the entail was created by the will of the last owner, whose widow joins as dowress, instead of this recital, say—

Variation where tenant in tail claims as devisee of last owner, who has left a widow entitled to dower.

"WHEREAS [*testator*], late of ——, deceased, being at the time of making his will hereinafter recited, and from thence until his decease, seised to him and his heirs of the hereditaments hereinafter described, and hereby intended to be released, did, in and by his last will and testament, bearing date, &c., devise all his real estate unto the said [*vendor*], and the heirs of his body: AND WHEREAS the said [*testator*], the testator, died on the —— day of —— last without revoking or altering the hereinbefore recited devise contained in his said will, leaving the said [*vendor*], and also the said [*dowress*], his widow, him surviving."

Remarks upon the recital in the text, and variation.

The general recital in the text, that the vendor was seised in tail, would not be proper under the circumstances to which the variation in the note applies, for two reasons, which render it necessary to refer to the seisin of the last owner: one, that the dowress derives her title from him; the other, that the vendor's covenants extend to his acts. If the estate tail were created, as entails very frequently are, by marriage settlement, the recital in the text would be sufficient, unless the vendor's covenants extend to the acts of the settlor. Upon this point, it should be observed, that, as the tenant in tail comes in as a purchaser for a valuable, though not for a pecuniary consideration under such settlement, there seems to be no valid ground for such an extension of the covenants; and the settlement, if properly drawn, will have contained covenants for title by the settlor, of which the purchaser will have the benefit; and even if it does not in strictness, this is no more a reason for making the vendor's covenants extend to the acts of the settlor, than the want of covenants in the

BARGAIN AND SALE ENROLLED, FROM TENANT IN TAIL.

Testatum.

said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the said —— and hereditaments for an estate in fee-simple in possession at the price or sum of £—— (*d*). NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— of &c. paid by the said [*purchaser*] to the said [*vendor*] at or before the sealing and delivery of these presents, the receipt &c., and for the purpose of barring and extinguishing all estates tail, and all remainders and reversions thereupon expectant and depending of and in the said —— and hereditaments, and of limiting the same to the uses hereinafter expressed, and also in consideration of the sum of 10*s.* of like lawful money by the said [*tenant*] to the said [*vendor*] paid at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged (*e*), he the said [*vendor*] *Hath* granted, bargained, and sold, and by these presents *Doth* grant, bargain, and sell (*f*), unto the said

In consideration of purchase-money, and to bar all entails, &c., vendor conveys to tenant.

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last purchase-deed (supposing the property to have been so derived) would be a ground for extending the present covenants to the acts of such vendor. The practice, however, is not in complete unison with the strict rule of technical propriety in this respect; and a vendor claiming under a settlement does not often, and perhaps in fairness (apart from technical considerations) ought not to object to the covenants extending to the acts of the settlor. *Vide* Precedent, *ante* p. 544.

That dowress had agreed to join.

(*d*) "AND WHEREAS the said [*dowress*], in consideration of the affection which she bears to her son the said [*vendor*], and in order to enable him to carry into effect the hereinbefore recited contract, has agreed to release her dower in the said hereditaments, in manner hereinafter expressed."

(*e*) As a valuable consideration is essential to the operation of a bargain and sale (the very denomination of which implies a consideration of this nature), the insertion of the nominal pecuniary consideration from the bargainee to the bargainor is, in this solitary instance, a matter of importance.

Release by dowress.

(*f*) "And the said [*dowress*], to the intent that all her claim, right, and title to dower in the —— and hereditaments hereinafter described, and hereby intended to be released, may be absolutely released and extinguished, *Hath*

[*tenant*] and his heirs; ALL THOSE *(insert the parcels and general words);* And the reversion, &c.; And all the estate, &c., TO HAVE AND TO HOLD the said hereditaments and premises hereby bargained and sold, or intended so to be, with their appurtenances, unto and TO THE USE of the said [*tenant*] and his heirs, for ever; *To the intent* that he, the said [*tenant*], may become tenant of the freehold of the said —— and hereditaments &c. hereinbefore mentioned, and intended to be hereby assured, against whom one (*g*) or more common recovery or common recoveries may be had and suffered thereof at the costs and charges of the said [*vendor*] in such manner as is hereinafter mentioned: for which purpose it is hereby declared that it shall be lawful for the said [*demandant*], before the end of —— term now next ensuing, or of any subsequent term, to sue forth and prosecute out of his Majesty's High Court of Chancery, against the said [*tenant*] one (*h*) or more writ or writs of entry *sur disseisin en le post,* thereby demanding against the said [*tenant*] the said —— and hereditaments hereinbefore mentioned, and intended to be hereby

BARGAIN AND SALE ENROLLED, FROM TENANT IN TAIL.

Habendum to the tenant to the *præcipe*, that a recovery may be suffered.

Declaration as to the time and manner of suffering the recovery.

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remised, released, and quit-claimed; And by these presents *Doth* remise, release, and quit-claim unto," &c.

Nature of dowress's interest.

Until dower has been assigned, *i. e.* until it has been set out by the sheriff by metes and bounds, the dowress has a right only and not an estate; and which, consequently, is releasable by deed simply. For this reason, her concurrence in the present instance is not essential to make a good tenant to the recovery, nor need she join in the lease for a year. But, if she had married a second husband, she could not, during the coverture, have extinguished her dower but by fine, or (which would have been the better plan in this instance) by her and her husband being jointly vouched in the recovery. As she was incompetent, during her first coverture, to extinguish the inchoate or contingent right of dower which she then had in the lands of which her husband was seised, except by fine or recovery, of course, by parity of reason, she could not, during the second coverture, affect the dower, which had actually devolved to her on the death of her first husband, by any other means.

(*g*) If the lands are in two counties, say—
" two or more common recoveries."

(*h*) If the lands are in two counties, say—
" two or more writs of entry."

BARGAIN AND SALE ENROLLED, FROM TENANT IN TAIL.

assured, with their appurtenances, by such apt and convenient names and descriptions as shall be thought requisite to comprise the same respectively; And the said [*tenant*] shall thereupon appear (*i*), and vouch to warranty the said [*vendor*], who shall also appear and vouch over to warranty the common vouchee, as is usual in such cases, so that judgment may be given for the said [*demandant*], to recover the said

[*590] *hereditaments against the said [*tenant*], and for the said [*tenant*] to recover in value against the said [*vendor*], and for the said [*vendor*] to recover in value against the common vouchee; And so that execution may be awarded, and seisin taken upon the recovery or recoveries to be suffered as aforesaid, according to the usual form of common recoveries used in like cases; AND *it is hereby directed, declared, and agreed* by and between the parties to these presents, so far as they respectively are interested, that, after the common recovery or recoveries (*k*) hereby agreed to be suffered as aforesaid, shall have been actually suffered in manner aforesaid, or in any other manner, the same recovery and recoveries, and all and every other recovery or recoveries suffered or to be suffered by any of the said parties hereto, of the said —— and hereditaments hereinbefore described, and intended to be hereby assured, or any of them, either alone, or jointly with any other lands and hereditaments, shall, as to and concerning the —— and hereditaments hereinbefore described, operate and enure TO THE USE &c., *(uses to prevent dower in favour of the purchaser*, ut ante, p. 461) (*l*). *And* the said [*vendor*], for himself, his heirs, executors, and administrators, doth covenant and

Declaration of uses of recovery.

Covenants for the title by vendor with demandant.

(*i*) It saves expense to name, as demandant and tenant, persons who can attend at the Court of Common Pleas.

(*k*) If the lands are in several counties, say—

" the several recoveries hereby agreed," &c.

As to covenants by dowress.

(*l*) If the widow joins, add covenant by her with the demandant that she has done no act to incumber. It should seem, too, that she ought to covenant for further assurance; for, where a person joins in a conveyance for the purpose of releasing his interest, he ought, it is conceived, to bind himself to do whatever shall be necessary to confirm his act. This reasoning would apply to trustees, who are not, in practice, usually required to enter into such a covenant.

agree with the said [*demandant*] and his heirs, by these presents, in manner following, (that is to say), that (for and notwithstanding any act, deed, matter or thing, done, committed, or suffered by the said [*vendor*] (*m*) he the said [*vendor*] now hath in himself full power and lawful and *absolute authority by these presents and the common recovery hereinbefore agreed to be suffered, to convey, limit, and assure the said —— and hereditaments mentioned to be hereby assured as aforesaid, with their appurtenances, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; *And further*, that *(premises shall remain to the uses aforesaid, free from incumbrances, and for further assurance*, ut ante, p. 463). IN WITNESS (*n*), &c.

BARGAIN AND SALE ENROLLED, FROM TENANT IN TAIL.

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(*m*) Add, if the vendor is a devisee, *ut ante*, p. 587.

" or by the said [*testator*], the testator deceased, or by any person or persons lawfully claiming through, under, or in trust for them or either of them."

These words would include the dowress.

(*n*) The deed making the tenant to the *præcipe* must be executed before the end of the term in which the recovery is suffered; but the purchaser should not pay his money until the return of the writ on which the tenant in tail is vouched, after which the death of the vouchee would not invalidate the recovery.

ASSIGNMENT *of the* BENEFIT *of an* AGREEMENT *for a* LEASE (*a*).

ASSIGNMENT OF AGREEMENT FOR A LEASE.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the one part; and [*purcha-* Parties.

(*a*) As to whether the benefit of an agreement for a lease is assignable, or, in other words, whether the assignee of such an agreement can enforce the specific performance against the lessor in a Court of equity, see some observations, *ante*, Vol. 4, p. 346. Of course, a formal assignment is not

As to assigning agreement for a lease.

ASSIGNMENT OF AGREEMENT FOR A LEASE.

Recital of agreement to grant a building lease.

ser], of &c., of the other part: WHEREAS, by articles of agreement, bearing date on or about the —— day of —— 18—, made between [A. B.] of &c., of the one part; and the said [*vendor*], of the other part; the said [A. B.], in consideration of the covenants and conditions hereinafter contained, agreed to let unto the said [*vendor*], ALL THAT piece of ground, situate, &c., *(Describe it)*. And the said [*vendor*] did thereby, for himself, his executors, administrators, and assigns, agree to erect on the said piece of ground two good substantial brick-built dwelling-houses of the third rate or class of buildings, of an uniform elevation, conformably in every respect to a certain drawing or plan mentioned to have been then exhibited to him for that purpose (*b*), the said houses to be built in

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necessary for this purpose. An agreement in writing would be sufficient; but, in order to enable either party to maintain an action of covenant, it should be *under seal*. It might be shortly expressed by indorsement, thus:—

SHORT PRECEDENT OF INDORSED AGREEMENT.

"AGREED this —— day of ——, BETWEEN the within named [*vendor*], of the one part; and [*purchaser*], of &c., of the other part; In consideration of 20*l.* this day paid by the said [*purchaser*] to the said [*vendor*], the receipt whereof the said [*vendor*] hereby acknowledges, the said [*vendor*] hereby absolutely sells to the said [*purchaser*] the benefit of the within-written agreement, and of all covenants and stipulations therein entered into with the said [*vendor*], and of all the remedies to be taken or pursued by virtue thereof, and agrees, at the expense of the said [*purchaser*], to do all necessary acts for causing the within-named [*lessor*] to grant to the said [*purchaser*] the lease within contracted to be granted to the said [*vendor*]; AND the said [*purchaser*], in consideration of the premises, for himself, his heirs, executors, and administrators, hereby agrees with the said [*vendor*] to perform all the covenants and stipulations on the part of the said [*vendor*] contained in the said agreement, and to indemnify him from all actions, suits, damages, and expenses by reason of his the said [*purchaser's*] non-performance thereof. IN WITNESS, &c.

Separate plan

(*b*) It is clear, that, if an agreement refer to a plan as detailing the

ASSIGNMENT OF AGREEMENT FOR A LEASE.

a workman-like manner, with good and substantial materials of every kind, to the approbation of the surveyor for the time being of the said [A. B.]; and to be covered in within four calendar months from the day of executing the now being recited agreement; and should and would immediately insure the said houses in the —— fire office. And the said [A. B.] did thereby for himself, his executors or administrators, agree, when the said houses should be covered in, to grant a lease unto the said [*vendor*] of the ground before described for the term of —— years from Lady-day then last, the said [*vendor*] paying therefore yearly during the term of the lease thereby agreed to be granted the sum of —— pounds, by quarterly payments, the first payment to commence at Michaelmas-day then next, without deduction by reason of taxes or otherwise howsoever; and which said lease was to be prepared by the solicitor of the said [A. B.], at the sole expense of the said [*vendor*], and to contain all the customary clauses, provisoes, conditions, and restrictions usually inserted in leases granted by the said [A. B.] to his undertenants. And whereas the said two dwelling-houses so agreed to be built by the said [*vendor*] have been partly erected by him, but are not yet covered in. And whereas the said [*purchaser*] hath contracted with the said [*vendor*] for the purchase of all such benefit and advantage as he the said [*vendor*] hath or may have by virtue of the said recited articles of agreement in the said premises thereby agreed to be leased as aforesaid, at the price

—that houses remain unfinished.

—of agreement to grant a building lease.

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particular mode in which a building contract is to be executed, parol evidence is admissible to shew the identity of the plan. *Hodges* v. *Horsfall*, 1 Russell & Mylne, 116. See, also, *Clinan* v. *Cooke*, 1 Sch. & Lef. 32; *Bladgen* v. *Bradbear*, 12 Ves. 471. But the evidence must be such as to leave no doubt of the identity of the paper to which the reference is made; and, in the first of the cases above cited, Lord *Lyndhurst* dismissed a bill for the specific performance of an agreement to grant a lease of "All those premises at B., in the occupation of Y., known by the sign of the M. public-house, with the additions intended to be made thereto by H. (the intended lessee), *as per plan*, for 31 years," &c. because the evidence failed to shew which of several plans was the one intended. In order to avoid questions of this nature the plan should be signed by the parties and annexed to the contract; or, which would be still better, should be indorsed on the contract."

may be referred to.

ASSIGNMENT OF AGREEMENT FOR A LEASE.

Testatum. In consideration of purchase-money, vendor assigns to purchaser the benefit of the agreement.

or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said contract, and in consideration of the sum of £—— of lawful money of Great Britain and Ireland paid to the said [*vendor*] by the said [*purchaser*] immediately before the execution of these presents, the receipt of which said sum in full for such purchase-money as aforesaid the said [*vendor*] doth hereby acknowledge, and from the same doth for ever absolutely discharge the said [*purchaser*], *his executors, administrators, and assigns; He the said [*vendor*] *Doth*, by these presents, bargain, sell, assign, transfer, and set over unto the said [*purchaser*], his executors, administrators, and assigns, the said recited articles of agreement of the —— day of ——, and all the right, title, trust, interest, property, possession, benefit, claim, and demand whatsoever, at law and in equity, which he the said [*vendor*] now hath or may have by virtue of the said recited articles of agreement, and the covenants, stipulations, and agreements therein contained on the part of the said [A. B.], in, to, or out of the said premises described in the said articles of agreement, and so thereby agreed to be leased as hereinbefore is mentioned, with the appurtenances; *And also* all and singular the said covenants, stipulations, and agreements in the said articles of agreement contained, on the part of the said [A. B.], his heirs, executors, or administrators, to be performed; *And all* benefit and advantage which the said [*vendor*], his executors or administrators, might or could have had by virtue thereof, if these presents had never been made: TO HAVE AND TO HOLD the said articles of agreement, and all other the premises hereinbefore assigned, or expressed so to be, unto the said [*purchaser*], his executors, administrators, and assigns, for his and their absolute benefit, in as full, ample, and beneficial a manner as the said [*vendor*] might or could have held and enjoyed the same premises, if these presents had not been made; subject, nevertheless, to the observance and performance by and on the part of the said [*purchaser*], his executors, administrators, and assigns, of the several covenants, stipulations, and agreements in the aforesaid articles of agreement contained, on the part of the said [*vendor*], his executors or administrators, to be performed, or such of the covenants, agreements, and stipulations, as are now unper-

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formed or capable of taking effect (*b*). And the said [*vendor*] doth hereby for himself, his heirs, executors, and administrators, covenant with the said [*purchaser*], his executors, administrators, and assigns, by these presents, in manner following, that is to say, that he the said [*vendor*] hath not at any time heretofore made, done, executed, or knowingly suffered any act, deed, matter, or thing whatsoever, by means whereof he is prevented from effectually assigning the aforesaid articles of agreement and premises, in manner aforesaid, and according to the true intent and meaning of these presents; *And also* that he the said [*vendor*], his executors or administrators, shall and will, on the request, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, use his and their best endeavours to induce and procure the said [A. B.] to grant a lease of the said piece or parcel of ground to the said [*purchaser*], his executors, administrators, or assigns (*c*): And the said

ASSIGNMENT OF AGREEMENT FOR A LEASE.

vendor that he has done no act to prevent his assigning the agreement;

and to use his best endeavours to procure lease to be granted to purchaser.

Covenant by

(*b*) Some persons add a power of attorney by the vendor to the purchaser; such a power is only necessary to enable the purchaser to sue on the agreement *at law*, where he must use the name of the vendor. If it be thought advisable to insert a power for this purpose, it may be shortly expressed as follows—

"And the said [*vendor*] doth hereby absolutely and irrevocably constitute and appoint the said [*purchaser*], his executors and administrators, the true and lawful attorney and attornies of him the said [*vendor*], for him and in his name, or otherwise, but at the sole risk and costs, and for the benefit of the said [*purchaser*], his executors or administrators, to demand from the said [A. B.], and all other persons whom it may concern, the said lease agreed to be granted in and by the hereinbefore recited agreement as aforesaid; And to bring or institute any action, suit, or other proceeding, at law or in equity, by virtue of the said agreement, as by the said [*purchaser*], his executors or administrators, shall be deemed expedient; And for all or any of the purposes aforesaid to appoint a substitute or substitutes, and such substitution, from time to time, at pleasure to revoke."

Power of attorney to sue on agreement.

(*c*) As there is doubt whether a person having an agreement for a lease can insist upon its being granted to his nominee, sometimes a clause is

Agreement that vendor shall

purchaser to perform the stipulations of the contract.

[*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant with the said [*vendor*], his executors

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take the lease if required.

inserted in an assignment of such an agreement, obliging the vendor to take a grant of the lease to himself, if required by the lessor so to do, and assign it over to him as follows—

"And that in case the said [A. B.] shall refuse or decline to grant to the said [*purchaser*], his executors or administrators, the lease agreed to be granted by him to the said [*vendor*] as aforesaid, but shall require the same to be accepted and taken by the said [*vendor*], his executors or administrators, then that the said vendor, his executors or administrators, shall accept and take such lease accordingly, and shall and will immediately thereupon, on the request, and at the costs of the said [*purchaser*], his executors, administrators, or assigns, effectually assign the same, and the said piece or parcel of ground and premises therein to be comprised, unto the said [*purchaser*], his executors, administrators, or assigns, for his and their own proper use and benefit, for all the estate, term, and interest, so to be granted to the said [*vendor*], his executors, administrators, or assigns, therein as aforesaid, upon condition, nevertheless, and provided, that he the said [*purchaser*], his executors or administrators, shall pay to the said [*vendor*], his executors or administrators, the costs and expenses which he or they shall have incurred in obtaining such lease and the counterpart thereof, and shall, at the costs of the said [*purchaser*], his executors or administrators, execute and deliver to the said [*vendor*], his executors or administrators, a bond or convenant indemnifying him and them from all damages, costs, and expenses by reason of the covenants which shall have been entered into by the said [*vendor*], his executors or administrators, in such lease so taken by him or them as aforesaid."

The insertion of clauses of this nature must not be considered as of course, for a vendor would generally object, under such circumstances, to subject himself to the rent and covenants of the lease, and take the purchaser's personal indemnity against those covenants. Another mode sometimes resorted to for effecting the object, is to authorize the purchaser to accept a lease and execute the counterpart in the name of the vendor. It should be observed that, as the only ground for these expedients is the

and administrators, that he the said [*purchaser*], his executors, administrators, or assigns, shall and will, from henceforth, perform and fulfil all the covenants and stipulations in the said recited articles of agreement expressed, on the part of the said [*vendor*], his executors, administrators, and assigns, to be performed and fulfilled, or such of the said covenants and stipulations as now remain subsisting, unperformed, or capable of taking effect; And shall and will at all times hereafter effectually keep harmless and indemnified the said [*vendor*], his heirs, executors, and administrators, of, from, and against the same covenants, stipulations, and agreements, and all actions, suits, costs, charges, damages, expenses, claims, and demands whatsoever, for or in respect of the same covenants, stipulations, and agree-

ASSIGNMENT OF AGREEMENT FOR A LEASE.

—and indemnify the vendor in respect thereof.

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doubt whether the performance of the contract could be enforced by a nominee of the intended lessee, if the agreement be express upon this point *(as it always ought to be)*, the clauses in question are quite unnecessary. Indeed, it is conceived, that the better opinion is, that, even if assigns or nominees were not mentioned in the agreement, the lessor would be bound to grant the lease to the nominee of his intended lessee, unless he could shew that his security was likely to be diminished by the substitution of such nominee for the party with whom he had contracted. A question of a similar nature would arise on a sub-contract for sale entered into by the purchaser of leaseholds before he had obtained his assignment, namely—whether the vendor was bound to make the assignment to, and accept the covenants of indemnity of the sub-purchaser against the rent and covenants of the lease. According to the above suggestion, he would be bound, unless he could prove the individual proposed to be objectionable. If a power of attorney, *ut supra*, is given, the following addition should be made to the covenant—

"And also that he the said [*vendor*], his executors or administrators, shall not at any time hereafter, without the consent in writing of the said [*purchaser*], his executors or administrators, revoke the power or authority hereinbefore contained, or become nonsuit in, or otherwise interfere with, any action, suit, or other proceeding, which shall or may be brought or instituted by the said [*purchaser*], his executors or administrators, or his or their substitute or substitutes, by virtue thereof."

Not to revoke power.

ASSIGNMENT OF AGREEMENT FOR A LEASE.

ments, or otherwise in relation thereto (*d*). In witness &c.

(*d*) Add, if a power of attorney is given—

And also in respect of the power.

"And also for or in respect of the power or authority hereinbefore given to the said [*purchaser*], his executors or administrators, or any actions, suits, or other proceedings, at law or in equity, which may be brought or instituted by the said [*purchaser*], his executors or administrators, or his or their substitute or substitutes, by virtue thereof, or otherwise in relation thereto."

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